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V. 3444  
2214

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

KIERAN JAMES MAURIETTA, )  
 )  
 ) Petitioner-Appellant, )  
 vs. ) NO. 21714  
 )  
 STATE OF ARIZONA, )  
 )  
 ) Respondent-Appellee. )  
 \_\_\_\_\_ )

RESPONDENT-APPELLEE'S ANSWERING BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF ARIZONA

WILLIAM J. SCHAFER III  
Pima County Attorney  
300 Transamerica Building  
Tucson, Arizona

By Stanley L. Patchell  
STANLEY L. PATCHELL  
Deputy County Attorney

AND  
By Clague A. Van Slyke  
CLAGUE A. VAN SLYKE  
Special Deputy County Attorney

ATTORNEYS FOR THE RESPONDENT-APPELLEE

Filed this \_\_\_\_\_ day of July, 1967.

FILED

JUL 3 1967

CLERK OF THE NINTH CIRCUIT COURT OF APPEALS

WM. B. LUCK, CLERK

JUL 10 1967







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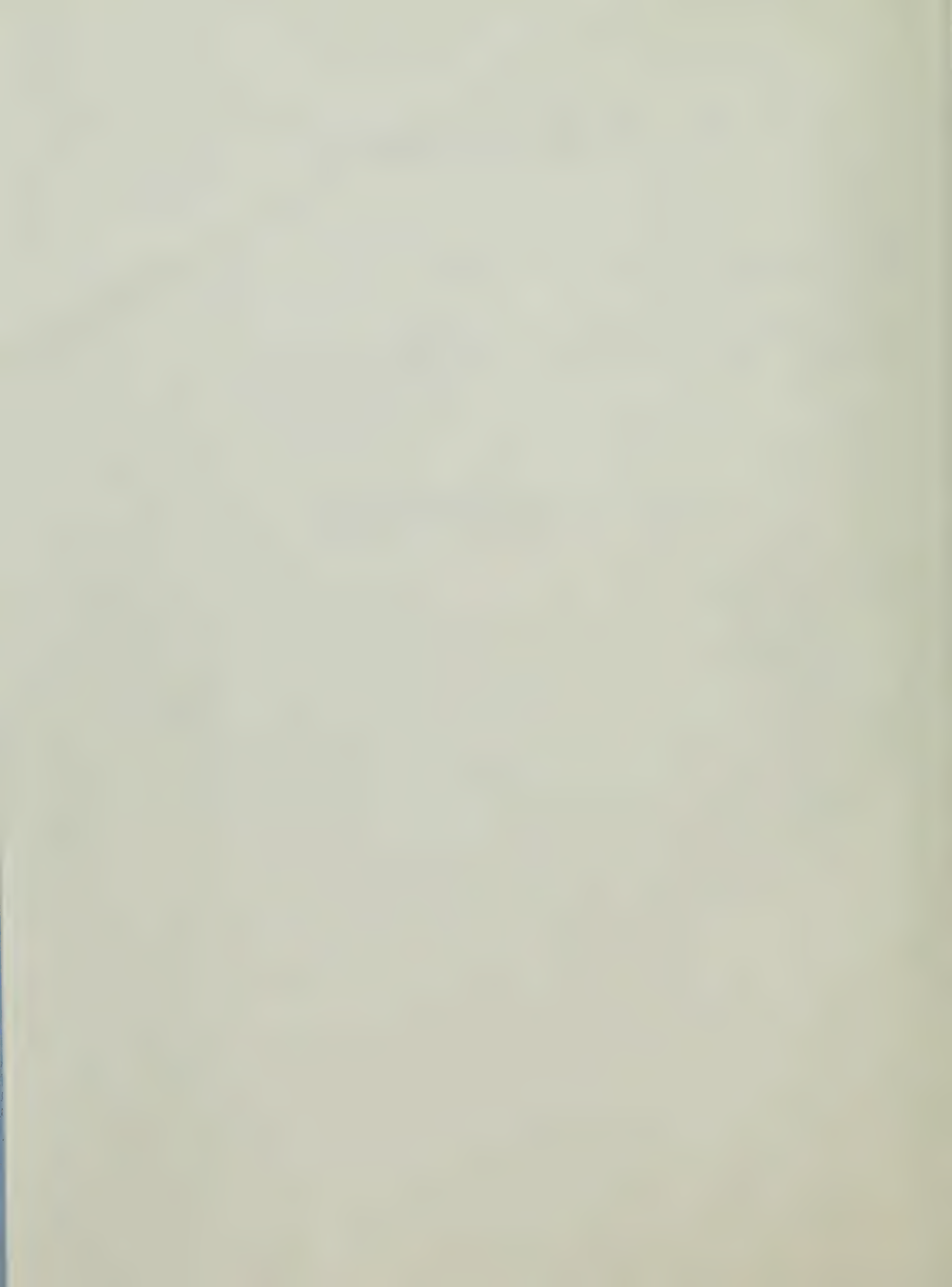
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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

KIERAN JAMES MAURIETTA,	)	
	)	
Petitioner-Appellant,	)	
	)	
vs.	)	NO. 21714
	)	
STATE OF ARIZONA,	)	
	)	
Respondent-Appellee.	)	
_____	)	

RESPONDENT-APPELLEE'S ANSWERING BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF ARIZONA







## STATEMENT OF THE CASE

The Petitioner-Appellant, KIERAN JAMES MAURIETTA, was arrested by the Pima County, Arizona, Sheriff's Office on the 27th day of February, 1967, for the crime of Obtaining or Attempting to Obtain Money or Property by Means of False or Bogus Check, a felony. On the 6th day of March, 1967, and on the 7th day of March, 1967, preliminary hearings were had and the justices of the peace found probable cause to believe that the Petitioner-Appellant had committed the crimes with which he was charged and the Petitioner-Appellant was held to answer to the Superior Court of Arizona, in and for the County of Pima. He was held to answer on two counts of "Bogus Checks" at the March 6, 1967, preliminary hearing and one count of "Bogus Checks" at the March 7, 1967, preliminary hearing. On March 17, 1967, an information charging the Petitioner-Appellant with three counts of "Bogus Checks" was filed in the Superior Court of Arizona, in and for the County of Pima.

The Petitioner-Appellant after his preliminary hearings and prior to being committed to the State Mental Hospital at Phoenix, Arizona on the 16th day of May, 1967, filed with the United States District Court for the District of Arizona a document entitled:







"Petition for Removal of Criminal Cases from Superior Court of Pima County into United States District Court, Tucson, Arizona, under Title 28, U.S.C. A., Sections 1443, 1446, 1447, 1448, 1449 and 1450. " The files of the Clerk of the Superior Court of Pima County indicate that his Petition was filed with that court on March 24, 1967, at 3:58 P.M. ; a copy of said Petition is attached hereto. The Honorable James A. Walsh, Judge of the District Court, by Minute Entry dated the 14th day of March, 1967, denied Petitioner-Appellant's Petition deeming it wholly without merit and denied his petition to proceed in forma pauperis. A copy of the Minute Entry is in this court's record. Petitioner-Appellant has appealed to this Court asking that this Court "overrule" Judge Walsh's denial and "reverse and remand the case" for a "full hearing" on Petitioner-Appellant's "Removal Petition as a matter of right. "





## SUMMARY OF ARGUMENT

The argument of the State of Arizona in opposition to the argument of Petitioner-Appellant consists of two basic points:

1. The Petitioner-Appellant was never properly before the United States District Court in that his petition did not allege facts which would permit removal.

2. The Petitioner-Appellant was not hurt by the proceedings in the United States District Court in that if the court had not rejected his petition and had permitted him to proceed in forma pauperis, the Petitioner-Appellant's allegations were not sufficient under the Civil Rights Act to entitle him to removal





removal under the Civil Rights Act.

The Act itself, in Section 1446 (a) provides in part:

"A defendant . . . desiring to remove any . . . criminal prosecution from a state court shall file in the district court of the United States . . . a verified petition containing a short and plain statement of the FACTS WHICH ENTITLE HIM TO REMOVAL . . ." (Emphasis Supplied)

None of the FACTS which were alleged in the Appellant's petition, assuming they are facts, entitle him to a removal under the Civil Rights Act.

The Supreme Court of the United States said in the City of Greenwood, Mississippi v. Peacock, 86 A S.Ct. 1800 (1966) 16 L ed 2d 944, 384 U.S. 808,

"Under 1443 (1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that these rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. State of Georgia v. Rachael, supra; Strander v. State of West Virginia, 100 U.S. 303, 25 L ed 2d 664."

The Petitioner-Appellant has not alleged any facts or circumstances which meet this test.

The Appellant argues that by his filing of a copy of his "Removal





Petition" the removal was effected and that the Federal Court had to remand him. He is probably referring to Subsection (e) of Section 1446 which says:

"Promptly after the FILING OF SUCH PETITION and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State, court which shall effect the removal and the State court shall proceed no further unless and until the case is remanded." (Emphasis Supplied)

Subsection (e) in referring to "such petition" is referring back to Subsection (a) of Section 1446, to the "verified petition containing . . . facts which entitle him . . . to removal . . ." It is the State of Arizona's position that there cannot be a removal under Subsection (e) until there has been a compliance with Subsection (a). It follows that if there was no removal there need be no remand.

If it were not true that there must be a proper allegation of facts then the legislature would not have said that the defendant "shall" file one. As was pointed out in the Peacock case (supra):

". . . In the fiscal year 1963 there were 14 criminal removal cases of all kinds in the entire nation; in fiscal 1964 there were 43. The present case was decided





by the Court of Appeals for the Fifth Circuit on June 22, 1965, just before the end of the fiscal year. In that year, fiscal 1965, there were 1,079 criminal removal cases in the Fifth Circuit alone. But this phenomenal increase is no more than a drop in the bucket of what could reasonably be expected in the future. For if the individual petitioners should prevail in their interpretation of § 1443 (1), then every criminal case in every court of every State -- on any charge from a five-dollar misdemeanor to first-degree murder -- would be removable to a federal court upon a petition alleging (1) that the defendant was being prosecuted because of his race and that he was completely innocent of the charge brought against him, or (2) that he would be unable to obtain a fair trial in the state court. On motion to remand, the federal court would be required in every case to hold a hearing, which would amount to at least a preliminary trial of the motivations of the state officers who arrested and charged the defendant, of the quality of the state court or judge before whom the charges were filed, and of the defendant's innocence or guilt. "

The court in using the foregoing language has pointed out a very practical difficulty which would arise if the Petitioner-Appellant's contentions are correct. That is, there would not be enough Federal judges or courtrooms to have all the hearings that would be necessary. The delay which this would obviously





cause in the state court proceedings would be of tremendous proportions and the idea of a speedy trial would be reposed in the defendant only. If the defendant chose, he could automatically get a delay by filing a petition in the federal court and the federal courts would be overburdened with hearings on motions to remand. No more basis for removal would need be alleged than the Petitioner-Appellant has alleged in this case.

Referring to page one of Respondent-Appellee's Answering Brief, the various bases for removal alleged in Petitioner-Appellant's original petition have been enunciated. None of these alleged "denials" refers to any "civil right" arising under a law of the United States. Even assuming that the Honorable James A. Walsh was in error in rejecting the Petitioner-Appellant's petition and should have allowed him to proceed in forma pauperis, this court should not remand the matter but should declare that the Petitioner-Appellant has not been harmed because there are no allegations of merit in his petition. As was said in Chestnut v. People of State of New York, 370 F 2, page 1, (1966):

" \* \* \* It is essential for removal that the prosecution be '[a]gainst any person who is denied or cannot enforce [one of his civil rights] in the courts of such state,' and that the





right must be one arising 'under any  
law providing for the equal civil rights  
of citizens of the United States.' ''  
(in order to remove a case under  
Section 1443 (1).)





CONCLUSION

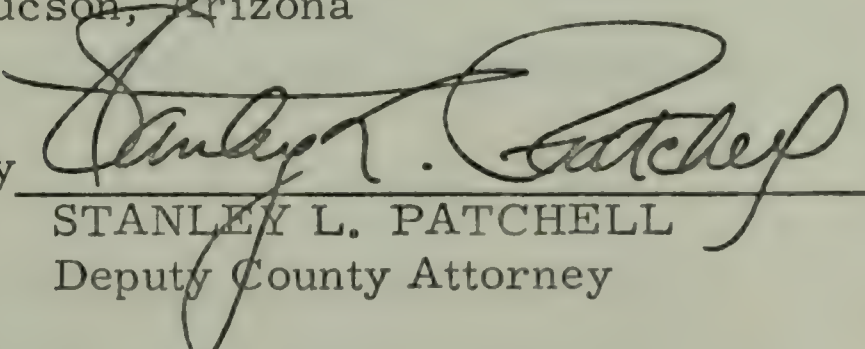
Therefore, even if all the allegations of the Petitioner-Appellant's Petition for Removal are absolutely true, he has still not alleged the denial of any civil right to which he is entitled under any law of the United States.

The Minute Entry Order of the District Court should be affirmed.

Respectfully submitted this 30th day of June, 1967.

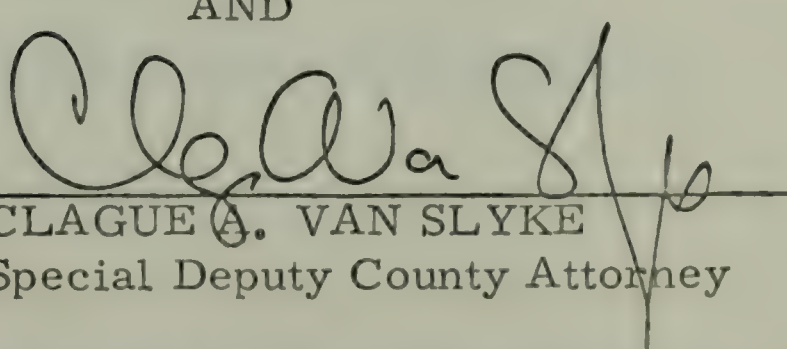
WILLIAM J. SCHAFER III  
Pima County Attorney  
300 Transamerica Building  
Tucson, Arizona

By

  
STANLEY L. PATCHELL  
Deputy County Attorney

AND

By

  
CLAGUE A. VAN SLYKE  
Special Deputy County Attorney

ATTORNEYS FOR THE RESPONDENT-  
APPELLEE





## APPENDIX

### TITLE 28, U. S. C.

#### SECTION 1443 CIVIL RIGHTS CASES

Any of the following civil actions or criminal prosecutions, commenced in a state court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

#### SECTION 1446 PROCEDURAL FOR REMOVAL

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a state





court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) . . .

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) . . .

(e) Promptly after the filing of such petition and bond (referring to Subsection (d), the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such state court, which shall effect the removal and the state court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the state court, the district court shall issue its writ of habeas corpus, and the marshall shall thereupon take such defendant or





defendants into his custody and deliver a copy of the writ to the clerk of such state court.





(Copy of said Petition referred to in Respondent-Appellee's Answering Brief on page two is attached herewith).

PETITION FOR REMOVAL OF CRIMINAL  
CASES FROM SUPERIOR COURT OF PIMA  
COUNTY INTO UNITED STATES DISTRICT  
COURT, TUCSON, ARIZONA, UNDER TITLE  
28, U.S.C., SECTIONS 1443, 1446, 1447,  
1448, 1449 and 1450



Tucson, Arizona

MAR 24 3 5

FRANCIS J. [unclear]  
CLERK SUPERIOR  
BY C. J. [unclear]  
DEPUTY

To: The Honorable Clerk  
United States District Court  
Federal Building  
Tucson, Arizona  
March 8<sup>th</sup>, 1967

—Petition for removal of Criminal Cases from Superior  
Court of Pima County into the United States  
District Court, Tucson, Arizona. —

Submitted by: Kieran J. Mauriotta  
Pima County Jail  
P.O. Box 210  
Tucson, Arizona

Case No. 91, U.S. District  
Court, Tucson, Arizona.)

Exhibit No. A-157168,  
(your file.)





United States District Court,  
Tucson, Arizona.

United States of America /  
Pima County, Arizona / SS

Kieran J. Maurietta,  
Petitioner,

vs.

State of Arizona,  
Respondent.

Petition for Removal  
of Criminal Case  
from Superior Court  
of Pima County into  
U.S. District Court,  
Tucson, Arizona,  
under Acts U.S. U.S.C.  
Sections 1443, 1442, 1441  
1443, 1442, and 1441.

Kieran J. Maurietta, Petitioner herein  
after first being duly sworn upon oath,  
deposes and says:





That he has notified the Clerk of Superior Court Tucson, Arizona of this action, and as soon as same is filed in this Court he shall send a copy of this Petition to the said Clerk of said Court, which is possessed of the records, to effect the removal or removal by law;

Qualified Pauper's Oath;  
Motion to file and proceed in forma pauperis, and  
Motion for appointment of Counsel, conditional,  
under Title 28, U.S.C., Sec. 1915.

1. That he is a citizen of the United States of the State of Illinois by virtue of birth, and he is of legal age;

2. That he brings this (his) Petition in good faith;

3. That he has had no training in the science of law, and he urges this Court to give this (his) Petition impartial construction and to interpret the rules of procedure liberally in his favor;

4. That he is in debt more than \$1,400, and he has sent this Court his Civil Motion for recovery of \$1,400 on account of money owed him;

5. That he cannot afford to pay the costs of this proceeding without expense of the party to whom he is indebted and;

6. That he believes the party against whom he has sent his filing fee has not upon recovery of his debt \$1,400;



Petition for Removal of Criminal Cases from  
Superior Court of Pima County, Arizona to the  
U.S. District Court, Tucson, Arizona, on  
Title 28, U.S.C., Secs. 1443, 1446, 1447, 1448, 1449,  
1450.

## Statement of Fact

Petitioner was arrested at Tucson International  
Airport on or about February 27th, 1967, by one  
Captain John Dee Cuhase (last name is believed to be  
"Williams"), a deputy sheriff of Pima County,  
Arizona.

Petitioner was charged with abduction or  
attempting to obtain money or property (from banks)  
by bogus checks. He was lodged in Pima County  
Jail where he remains unto this day.

After Petitioner was booked up, the said Captain  
searched Petitioner's personal effects and found a  
key to an airport locker. The said Captain went or  
sent others to the said locker and searched and  
sized therefrom guns, clothes, and personal items  
belonging to Petitioner.





for recovery of \$1,200.40 clothes and personal property  
plus damages for said unlawful search and seizure.

Meantime, for 48 hours Petitioner was held completely incommunicado from all attorneys until the said unlawful seizure was effected and Petitioner obtained a written Court Order from Justice of the Peace Clark H. Johnson granting his right to contact attorneys.

By the time attorneys were at last permitted to see Petitioner, Petitioner's funds had been already seized and he was unable to retain Counsel.

Petitioner appeared for Preliminary Hearings before Justices of the Peace J. E. Jacobson and Clark H. Johnson, cases nos. 5935 and 27540, respectively, on March 6th and 7th, 1967.

(Both cases arise out of a single, alleged offense.)

At neither hearing did Petitioner have either a Court Reporter or attorney although he repeatedly moved for and demanded both at each of his hearings. Therefore, very little if any testimony, Cross-examination, or statements can accurately be remembered by anyone.

Justice Jacobson refused to appoint  
a Court Recorder because Petitioner did not give





several deputy sheriffs inside 24-hour prison  
notice for Court Reporter for his hearing before  
Justice Johnson.

Justice Johnson acknowledged the notice but  
refused Petitioner's request because it was made by  
telephone rather than in writing.

Neither Justice asked Petitioner to hire  
a Court Reporter or an attorney and both  
Justices used every technicality to deprive Your  
Petitioner of his rights.

Both Justices denied Your Petitioner's  
motions to continue the hearings so that Petitioner  
could send the Justices written notices for Court  
Reporters.

Both Justices repeatedly denied Petitioner's  
six (6) or eight (8) motions and demands for  
appointment of Counsel even after Petitioner  
reminded them of U.S. Supreme Court Decisions.

Justice Jacobson tried to convince Petitioner  
he had no right to remove his case into Federal  
Court, and, of course, both Justices bound Petitioner  
over to Superior Court. Each Justice set bond at  
\$2,500 for a total bond of \$11,000.



Petitioner is unable to enforce his constitutional rights in Arizona State Courts. His Preliminary Hearings were a farce, a mockery of justice. No record of the hearings exist upon which to predicate appeal. At the alleged hearings, Petitioner was not allowed to cross-examine witnesses fully and freely; his requests for Court Reporters were refused; his motions and demands for Counsel were denied, and his personal funds (\$1,200) have been unlawfully seized.

### Conclusion and Prayer

Wherefore, Petitioner prays as follows:

1. That all motions and requests herein be granted forthwith;
2. That a Writ of Habeas Corpus issue, forthwith, taking Petitioner out of the custody of the Sheriff of Pima County, Arizona and placing him into the custody of the United States Marshal;
3. That for the violations of Petitioner's constitutional rights, Petitioner be discharged and set at liberty.





petition, by Counsel or personally, be reserved;

5. That this Court order and direct county or/and State official to return to Petitioner all of Petitioner's \$ 1,200, clothes, and personal items forthwith. (An Affidavit follows.)

Respectfully Submitted,  
Kienan J. Morrison

Petitioner pro se

Subscribed and sworn to before me, a Notary Public  
on this 9th day of March A.D. 1912

Notary Public

Commission Expires: \_\_\_\_\_

John B. [unclear] [unclear]





Affidavit

Kieran J. Mauriolla,

Affiant, being first duly sworn upon oath before me and says he has read the foregoing Petition, by him made and subscribed, and the same is true and correct to the best of his knowledge and belief.

Kieran J. Mauriolla  
Affiant

Attest

Notary Public

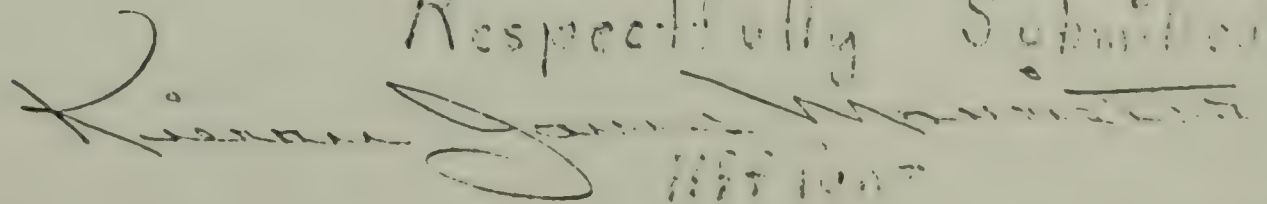
SS. John S. Sweeney



Supplemental Affidavit

Kieran J. Mauricella, Affiant, being first duly sworn upon oath before God, his Supreme Witness, and others, deposes and says he twice requested of Jail officials to call a Notary Public (or the U.S. Marshall or / and U.S. Commissioner) for formal notarization of his enclosed petition for Removal, and today he was advised by Lt. Putney, a Deputy Sheriff at the Pima County Jail, that formal notarization of legal papers is not necessary in the State of Arizona, and;

Therefore, Affiant submits his said petition without any formal notarization altho he prefers same in case of appeal outside the State of Arizona.

Respectfully Submitted  
  
 Affiant

Before God on this 9th day of March, 1961

Witnesses

1. Bobby H. Dixon

2. Richard Brown

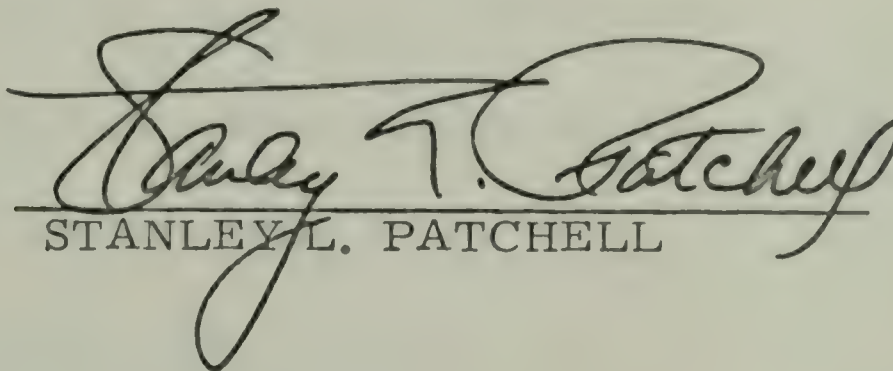
3. Bobby J. Anderson

4. <sup>1</sup>/<sub>2</sub> Oscar Cannon





I certify that, in connection with the preparation of this  
brief, I have examined Rules 18, 19 and 39 of the United States  
Court of Appeals for the Ninth Circuit, and that, in my opinion,  
the foregoing brief is in full compliance with those rules.



STANLEY L. PATCHELL





AFFIDAVIT OF MAILING

STATE OF ARIZONA)

) ss.

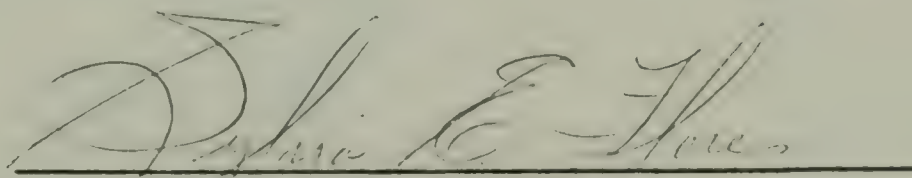
COUNTY OF PIMA )

SYLVIA E. FLORES, being first duly sworn, upon her oath  
deposes and says: That on the 30th day of June, 1967, she  
deposited in the United States Post Office, postage prepaid, three  
(3) copies of the within brief addressed to:

CHARLES M. GILES, ESQ.  
311 Valley National Building  
Tucson, Arizona 85701

and one (1) copy of the within brief addressed to:

MR. KIERAN JAMES MAURIETTA  
Arizona State Hospital  
2500 East Van Buren  
Phoenix, Arizona 85008.

  
\_\_\_\_\_  
SYLVIA E. FLORES

SUBSCRIBED AND SWORN to before me this 30th day of June,  
1967.

  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:  
March 28, 1970



NO. 21715

---

United States  
Court of Appeals  
for the Ninth Circuit

---

JOHN C. SWAN,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

*Upon Appeal from the Judgement of the United States  
District Court for the District of Oregon*

---

**BRIEF FOR THE APPELLEE**

---

FILED

---

SIDNEY I. LEZAK

SEP 27 1967

*United States Attorney  
District of Oregon*

WM. B. LUCK, CLERK

CHARLES H. TURNER

*Assistant United States Attorney*

SEP 27 1967





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## STATUTE INVOLVED

18 U.S.C. § 472. *Uttering counterfeit obligations or securities*

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both.

## RULES INVOLVED

### Rule 52. *Harmless Error and Plain Error*

(a) *Harmless Error*. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error*. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.



United States  
Court of Appeals  
for the Ninth Circuit

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JOHN C. SWAN,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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*Upon Appeal from the Judgement of the United States  
District Court for the District of Oregon*

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**BRIEF FOR THE APPELLEE**

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**COUNTER-STATEMENT OF FACTS<sup>1</sup>**

On July 12, 1966, at Salem, Oregon, a car registered to the defendant and containing three (3) men, including the defendant, drove up to the Silver Inn. (TR. 67-68, 80). While two (2) of the men waited in the car, the defendant entered the tavern and ordered a fifteen-cent glass of beer, paying for

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<sup>1</sup> "TR" denotes Transcript of Proceedings  
"D. Br." denotes Defendant's Brief

same with a ten dollar bill (TR. 67-69). The waitress, Geraldine Hoosier, determined the bill was spurious and offered to return it to the defendant who declined to accept the offer (TR. 70, 73). She queried the defendant as to where he was from and whether he had been downtown drinking. Defendant replied he was from Silverton, was hitchhiking, and that he had been "downtown" drinking at the Powah, Ricksha and Pickaninny Taverns (TR. 70-71, 75), although there is no Pickaninny Tavern in Salem (TR. 70). Defendant was then asked why the other two (2) men in the car didn't come into the tavern to which he apparently made no reply (TR. 70, 74). With respect to the ten dollar bill in question, defendant informed the waitress he could have received it in change while drinking in the foregoing taverns.

Defendant remained in the tavern 30 to 45 minutes. Upon being questioned for the second time as to why the two (2) men in the car would wait so long for him if he was hitchhiking, he abruptly got up and hurriedly departed without finishing the remainder of his third beer (TR. 74, 79).

Shortly before the trial defendant appeared at the Chateau, an establishment where the witness Hoosier was then working. After requesting the witness to cash a personal check, telling her he had previously frequented the establishment with a

friend of his (TR. 76), defendant attempted to engage her in a conversation concerning the forthcoming trial (TR. 76-77). After initially stating he had never been in the Silver Inn "in (his) life," he then admitted being there, although not for a period of forty-five minutes (TR. 77-78).

Two other witnesses also identified the defendant as the individual who passed an allegedly counterfeit bill in the Silver Inn Tavern on the evening of July 12, 1966 (TR. 82-83, 86-87).

The bill passed by the defendant on this date (Govt. Ex. 1) was described as a counterfeit obligation by Secret Service Agent John Wells of the Portland Office based on his training and twenty-four years experience (TR. 96-98). Agent Wells further testified from a summary prepared from certain Agency reports that other bills, identical to the bill passed by the defendant first appeared on June 30, 1966 and that eighteen of these bills had been received by the Secret Service in the State of Oregon: Nine in July, six in August, two in September, and one in October (TR. 98-102). Defendant's objection to the foregoing testimony on the ground he had been unable to examine the original document from which the summary was prepared was overruled (TR. 99-100). No testimony was offered with respect to the manufacturer or distributor of these notes.



Approximately one week later, on the evening of July 18, 1967, Officer W. Dale Halvorson, an off-duty, but uniformed policeman working for the Cabello Tavern in Seattle, Washington, observed the defendant in that establishment (TR. 107-108). Some time around 10:15 P.M. on this same evening a waitress brought Officer Halvorson two ten dollar bills (Govt. Ex. 5) pointing out the defendant as the person from whom she received them (TR. 108-109, 140). Outside the presence of the jury, Officer Halvorson testified these bills were shown to the defendant who admitted passing them stating they were genuine and that he had received them from a bank that morning (TR. 112-113). As a result of defendant's objection to this testimony (TR. 111) as well as an indication from the Court that it might be violative of the *Miranda* precepts, the Government moved to withdraw its offer of proof on this subject (TR. 115-116). The motion was granted.

Secret Service Agent Thomas Moore identified these two bills as counterfeit in nature and identical in composition and source to the bill (Govt. Ex. 1) passed by the defendant at the Silver Inn in Salem, Oregon, on July 12, 1967 (TR. 118-121).

Following defendant's arrest in Seattle, he was informed of the nature of the charges, of his right to counsel, that he need make no statements but



should he do so, they could be used against him in a court of law, and that he could make phone calls should he so desire (TR. 122).

Defendant made no statements or admissions at this time (TR. 122), although during the period of his incarceration following his arrest, he made certain admissions to Agent Moore (TR. 42-49). These admissions were the subject of a successful motion to suppress (TR. 61-62). Following the warning, a search was conducted of defendant's person and at which time a notebook (Govt. Ex. 2) and \$80.00 genuine currency was found (TR. 122-123, 130-131). Among the entries in this book was the name "Leroy, Taft, Calif." followed by the number 7633029 (TR. 125). Agent Moore's testimony that he had received reports from other Secret Service Agents containing the name Leroy was stricken on motion of the defendant and the jury instructed to disregard same (TR. 125). Agent Moore then testified he had "discussed counterfeiting matters" with Leroy, who he identified as Leroy Houts, Naylor Avenue, Taft, California. These conversations took place the day of and the day preceding the trial (TR. 127). Thereafter, the notebook (Govt. Ex. 2) was admitted into evidence over defendant's objection with the Court's admonition to the jury that they were the judges of the evidence and could give the exhibit whatever weight they felt it was worth (TR. 126).

Although cross-examination of Agent Moore disclosed Leroy was outside the courtroom during the trial, neither side called him as a witness (TR. 127).

An examination of the roll of currency found on defendant's person showed the bills to be in the following sequence: Three one dollar bills on the outside of the roll, followed by two fives, three ones, two more fives, four ones, a twenty, and three tens on the inside (TR. 131).

Based upon his twenty-five years experience in the Secret Service, Agent Moore concluded the foregoing sequence of the bills indicated they had been received in change from larger denominations, possibly ten dollar bills (TR. 130, 132-134). Agent Moore considered the particular sequence and denomination of the bills to be significant since, in his opinion, it would be unusual for a person to pay for a small purchase with a bill of a larger denomination when he already had bills of smaller denominations (TR. 132). Further, when apprehended passing bills of a particular denomination, a passer would normally have in his possession bills of smaller denominations in the quantity and order in which they were received as change from his various purchases (TR. 132, 134).

On cross-examination, Agent Moore testified the number of counterfeit notes a particular passer

would take with him would depend upon his expertise in this field; the more experienced and practiced operator would carry but one in order to provide an alibi if apprehended (TR. 144-145).

Agent Moore was also queried with respect to mark-up on the type of ten dollar note passed by the defendant in Seattle, to which he replied, "I can tell you what the defendant told me" (TR. 144-145). Defendant interposed no objection to the answer, although his motion to suppress all statements made to Agent Moore had been granted following an extensive hearing (TR. 3-7, 61-62). Agent Moore then testified the defendant told him this type of ten dollar bill cost \$65.00 genuine currency for every \$100.00 in counterfeit notes (TR. 145).

On redirect, the Government elicited the remainder of his conversation with the defendant on this subject: That defendant knew a person residing in Portland who sold counterfeit money at the foregoing price (TR. 149, 151).

The trial commenced on November 14, 1966, and concluded on November 16, 1966. The jury returned a verdict of guilty, and the defendant was committed to the custody of the Attorney General for a period of two years with the stipulation that he was eligible for parole at the discretion of the Board of Parole.



## SUMMARY OF ARGUMENT

### I.

Defendant was not prejudiced by the admission of a notebook (Govt. Ex. 2) seized from his person following his arrest in Seattle, Washington, or the testimony of Secret Service Agent Moore concerning an entry contained therein. Similarly, the fact that Agent Moore related a portion of a conversation with a man whose name appeared in this notebook does not require reversal even assuming the conversation was hearsay since the conviction was based upon substantial evidence independent of any alleged hearsay.

### II.

The expert testimony of Agent Moore respecting the significance of a roll of currency seized from the defendant following his arrest in Seattle, Washington, was properly admitted. Such testimony, which was within the particular acumen and knowledge of the witness, was highly relevant on the issue of defendant's knowledge and intent.

### III.

The admission of testimony by Agent Wells while using a summary prepared from other documents not in evidence was not error requiring reversal. Defendant's failure to assert the question of hear-



say in the trial court constituted a waiver of this point precluding its review.

#### IV.

No error was committed by the trial court in permitting the redirect examination of Agent Moore on a matter initially broached by defendant on cross. The testimony objected to was well within the confines of the cross-examination. Its admissibility therefore rested within the broad discretion of the trial court which is not subject to review absent an abuse of that discretion.

### ARGUMENT

#### I.

**No Error Was Committed In The Admission Of The Notebook Seized From The Defendant Following His Arrest In Seattle, Washington, Or In The Testimony Of Secret Service Agent Moore With Respect To An Entry Contained Therein.**

Defendant's first assignment of error presents a multi-pronged attack upon the admissibility of the notebook (Govt. Ex. 2) seized from his person following his arrest in Seattle and Agent Moore's testimony concerning a certain entry contained therein. The assignment is without merit.

Without objection Agent Moore was permitted to testify the notebook contained the entry "Leroy, Taft, Calif." followed by the number 7633029 (Tr.

125). He then testified he had received reports from other Secret Service agents containing the name "Leroy". This answer was stricken and the jury instructed to disregard same (Tr. 125). He further testified over objection that he had talked to Leroy, who he identified as Leroy Houts of Naylor Avenue, Taft, California, telephone number 7633029, about "counterfeiting matters" (Tr. 126). The notebook was then admitted over objection with the court's admonition to the jury that they were " . . . the judges of the weight and sufficiency of the evidence" and could give the exhibit whatever import they felt it merited (Tr. 126).

Agent Moore's initial statement respecting the receipt of reports from other Secret Service agents containing the name Leroy having been stricken, the only question remaining for the Court's consideration is the propriety of his later testimony that he conversed with Leroy about "counterfeiting matters". This statement in no way prejudiced defendant's right to a fair trial, being susceptible to numerous interpretations or inferences. Any number of citizens, innocent and guilty alike, are questioned daily by law enforcement authorities about their knowledge of criminal activities. Thus the mere fact of a conversation between a man whose name appeared in the defendant's notebook and a Secret Service agent concerning counterfeiting matters did

not inure to the defendant's prejudice. Further, the *de minimus* significance of the conversation and the notebook is manifest by the failure of either side to call Leroy as a witness, although he was present outside the courtroom during the trial (Tr. 127), as well as the government's total failure to mention either item during final argument.

Similarly the fact that the conversation may have been hearsay does not require reversal; its admission being harmless error within the ambit of Rule 52 (a), Federal Rules of Criminal Procedure.

"One of the main considerations in deciding if substantial prejudice exists because of the introduction of hearsay material is the strength of the government's case independent of hearsay." *U.S. v. Press*, 336 F.2d 1003, 1013 (2nd Cir., 1964), cert. den. 379 U.S. 965. To the same effect: *U.S. v. Watkins*, 369 F.2d 170 (7th Cir., 1966). See also *Lutwak v. U.S.*, 344 U.S. 604 (1953).

Contrary to defendant's assertion that the case presented "a close factual question" (D. Br. 3), the government's case was clearly and firmly established without the alleged hearsay statement.

Notwithstanding his assertion of mistaken identity (Tr. 157), defendant was positively identified by the waitress at the Silver Inn Tavern and two



(2) other patrons as being the individual who passed a ten-dollar bill (Govt. Ex. 1) at that establishment on July 12, 1966 (Tr. 69-73, 82-83, 86-87). Defendant's statements to the waitress as well as his conduct during his 30-45 minute stay at the tavern are fraught with contradictions and replete with inconsistencies clearly indicating guilty knowledge. Although he told the waitress he was hitchhiking he arrived in his own car; when questioned about the authenticity of the bill he stated he could have gotten it drinking "downtown" at the Powah, Ricksha and Pickaninny taverns although there is no Pickaninny Tavern in Salem (Tr. 70-71, 75, 80); when questioned why the two men in the car continued to wait for him if he was hitchhiking, he abruptly got up and departed, leaving an unfinished beer (Tr. 74, 79). The fact that he later sought out the waitress at her new place of employment shortly before the trial, in which he attempted to engage her in a conversation about the trial, initially telling her he had never been to the Silver Inn Tavern but later admitting he had (Tr. 76-78), further belies his theory of innocence. To further compound matters, just six days later on July 18, 1966, defendant passed two more bills in Seattle, Washington, identical in composition and denomination to the one passed in Salem (Govt. Ex. 5, Tr. 108-109, 118-121, 140).



It is patently apparent from the foregoing that the government's case was not predicated upon the alleged hearsay which defendant urges was "very prejudicial" (D. Br. 15).

In the face of such egregious error it is significant to note defendant failed to move for a mistrial. It is an accepted proposition that denial of an objection to allegedly prejudicial matter does not normally require reversal where defendant fails to move for a mistrial particularly where no curative action is sought of the Court. *Devine v. U.S.*, 278 F.2d 552, 556 (9th Cir., 1960); *U.S. v. Wright*, 309 F.2d 735, 738 (7th Cir., 1962), cert. den. 372 U.S. 929.

In addition to the foregoing assignment of error defendant also urges the admission of the notebook (Govt. Ex. 2) and the attendant testimony was an application of the principle of "guilt by association" (D. Br. 14). Defendant neglects to point out that at no time during the trial did he see fit to urge this point nor was there a motion for new trial based on this ground. The cases are legion that issues, even if constitutional, not properly raised and preserved in the trial court for review, will not be noticed on appeal. See for example *U.S. v. Millpax*, 313 F.2d 152, 157 (7th Cir., 1963), cert. den. 373 U.S. 903; *U.S. v. McCarthy*, 297 F.2d 183 (7th Cir., 1961), cert. den. 369 U.S. 850; *U.S. v. Green-*

*berg*, 268 F.2d 120, 124 (2nd Cir., 1959); *Minor v. U.S.*, 375 F.2d 170, 172 (8th Cir. 1967), and *U.S. v. Miller*, 316 F.2d 81 (6th Cir., 1963), cert. den. 375 U.S. 935. Similarly it is axiomatic that an objection on one ground which is untenable does not preserve the point for review even though there may be another and tenable ground which might have been raised but was not. *Taylor v. B & O Railroad Co.*, 344 F.2d 281, 287 (2nd Cir., 1965); *U.S. v. Miller*, 316 F.2d 81 (6th Cir., 1963), cert. den. 375 U.S. 935. In *Miller*, an appeal from a conviction for unlawful possession and sale of narcotics, defendant urged for the first time on appeal that the use of a "Fargo" device to transmit a conversation which took place in his residence to listeners (government agents) outside was an unconstitutional invasion of his home in contravention of the Fourth Amendment of the Constitution of the United States. The Court *inter alia* declined to consider this question because the constitutional issue was not raised in the District Court notwithstanding appellant's specific objection in that Court to the use of the evidence on grounds other than constitutional. To the same effect see also: *On Lee v. U.S.*, 343 U.S. 747, 749-750 N. 3 (1952) and *Gajewski v. U.S.*, 321 F.2d 261, 266-267 (8 Cir., 1963).

The only exception to the foregoing principles is where failure to consider the point on appeal would

result in an obvious miscarriage of justice despite defendant's failure to raise the issue in the trial court (R. 52(b), Federal Rules of Criminal Procedure). Not only does the record in the instant case not warrant the invocation of the "plain error" doctrine, but defendant himself makes no such suggestion.

## II.

### **The Trial Court Properly Admitted The Expert Testimony Of Agent Moore Respecting The Significance Of A Roll Of Currency Seized From The Defendant Following His Arrest In Seattle, Washington.**

Without case citation of authority, defendant contends that Agent Moore's opinion respecting the significance of the order and denomination of an \$80.00 roll of genuine currency seized from his person following his arrest in Seattle, Washington, was error (D. Br. 16, 18; TR. 130-134). This roll consisted of three one-dollar bills on the outside, followed by two five-dollar notes, three ones, two fives, four ones, a twenty and three tens on the inside (TR. 131).

Agent Moore's expertise was predicated upon attendance at certain Treasury Enforcement Schools, field training, and twenty-five years experience in the study, identification and detection of counterfeiters and counterfeit obligations (TR. 129-130, 132,



134-135). In his opinion, based upon the foregoing, the particular sequence and denomination of the various bills comprising the roll indicated they had been received in change from larger denominations, possibly ten-dollar bills. (Tr. 132, 134). He felt it would be unusual for a person to pay for a small purchase with a bill of a larger denomination while in possession of bills of smaller denominations (TR. 132). He further stated that when apprehended, a passer would normally have in his possession bills of smaller denominations in the quantity and order received from his various purchases (TR. 132, 134).

Not only can there be no question concerning Agent Moore's expertise on the above subject, defendant even conceding same at the trial (TR. 144), but it is well settled that the qualifications of the expert witness, as well as the matters to which he may testify, rest peculiarly within the sound discretion of the trial court whose decision will not be disturbed on review absent an abuse of that discretion. *Lelles v. U.S.*, 241 F.2d 21 (9th Cir., 1957), *cert. den.* 353 U.S. 974; *Jenkins v. U.S.*, 307 F.2d 637, 645 N. 19 (D.C. 1962); *Cohen v. Travelers Ins Co.*, 134 F.2d 378 (7th Cir., 1943); *Redman v. U.S.* 136 F.2d 203 (4th Cir., 1943); *Harris v. Afran Transport Co.*, 252 F.2d 536 (3rd Cir., 1958); Wharton's Criminal Evidence, Vol. II, 12th Ed., 1955, p. 507.



In determining if a matter is properly the subject of expert testimony, the test to be applied is whether the subject matter requires any special skill or knowledge not within the realm of the ordinary experience of mankind. See *Riley v. U.S.*, 225 F.2d 558, 559 (D.C. 1955); *Fen v. Consolidated Freightways*, 120 F.Supp. 289, 292 (D.C. N.D. 1954), affirmed 220 F.2d 82 (5th Cir. 1955); *Schille v. Acheson Topeka & Santa Fe R.R. Co.*, 222 F.2d 810, 814 (8th Cir., 1955); *U.S. v. Alker*, 260 F.2d 135, 155 (3rd Cir. 1958), *cert. den.* 359 U.S. 906. See also 1 *Wigmore on Evidence*, Sec. 682, P. 1092, 3rd Ed. 1940. Similarly, if the expert's testimony is otherwise proper, it is not objectionable as an invasion of the province of jury albeit it relates to the very issue the jury must decide. See *U.S. v. Johnson*, 319 U.S. 503, 519 (1943); *Riley v. U.S.*, 225 F.2d 558 (D.C. 1955); *Pasadena Research Laboratories v. U.S.*, 169 F.2d 375, 385 (9th Cir., 1945), *cert. den.* 335 U.S. 853.

Agent Moore's highly specialized training and experience uniquely qualified him to render an opinion on a matter completely foreign to the layman; the manner in which an individual engaged in counterfeiting activities passes spurious notes and receives change therefrom. Such testimony was highly relevant and probative on the issue of defendant's intent and knowledge particularly in view of his contention that the counterfeit notes passed

in Seattle were innocently received from legitimate sources (D. Br. 6; TR 161-162 and defendant's final argument, TR 184-194).

A somewhat analogous use of expert testimony was found to be proper in *Shew v. U.S.*, 155 F.2d 628, 630 (4th Cir., 1946), *cert. den.* 328 U.S. 870, a prosecution for illegal possession of a still. There, a federal officer of fourteen (14) years experience who had searched for and destroyed in excess of 2000 illicit stills was permitted to testify that a still had been in operation at the site where an old furnace and spent mash were found. He was also found to be qualified to describe the component parts of a still as well as the function in the distilling operation of a certain apparatus found on the defendant's premises.

In conclusion, it is submitted that in view of the demonstrated relevancy of Agent Moore's opinion and the broad discretion vested in the trial court to receive evidence of this nature, its reception was not error. See *Wilson v. U.S.*, 250 F.2d 312, 325 (9th Cir., 1957), *reh. den.* 254 F.2d 391 (1958).

### III.

#### **Admission Of Testimony By Agent Wells Was Not Prejudicial Error Requiring Reversal.**

Defendant contends the admission of testimony by Agent John Wells respecting certain documents

not in evidence was hearsay, substantially prejudicing the case and requiring reversal (D. Br. 19-22, TR. 98-100).

Agent Wells, using a summary prepared by him from certain records not in evidence and maintained in Washington, D.C., testified that eighteen (18) bills identical to those passed by the defendant were received by the Secret Service during the months July through October; nine (9) in July, six (6) in August, two (2) in September, and one (1) in October (TR. 98-102).

Defendant's objection to such testimony in the Court below was not predicated upon its alleged hearsay nature but rather that he was unable to examine the records from which the summary was prepared and that the summarization was not admissible unless these records were so voluminous they could not be produced (TR. 99).

Not only did defendant fail to assert the point on which he now relies in the trial court, but he chose to pursue the very subject objected to on direct during cross-examination (TR. 100-102). A more patent case of waiver can hardly be envisioned. See points and authorities on waiver under Government's Argument Point I above.

Even assuming, however, the question of the introduction of hearsay evidence was properly pre-



served in the Court below, the error, if such existed, did not contrive to deprive the defendant of a fair trial.

It is well settled that the admission of hearsay testimony does not per se require reversal. In determining if the defendant was prejudiced as a result thereof, the Courts consider the strength of the Government's case independent of the hearsay. *U.S. v. Press*, 336 F.2d 1003, 1013 (2nd Cir., 1963); *cert. den.* 379 U.S. 965; *U.S. v. Watkins*, 369 F.2d 170, 172 (7th Cir., 1957); *U.S. v. Cianchetti, et al*, 315 F.2d 584, 590 (2nd Cir., 1963). See also *Delli Paoli v. U.S.*, 352 U.S. 232, 236 (1957) and *Lutwak v. U.S.*, 344 U.S. 604, 619 (1953).

Defendant's guilt in the case at bar was based upon substantial evidence unaffected either directly or indirectly by Agent Wells' testimony concerning additional counterfeit notes, there being no attempt to connect this evidence with the defendant either during the trial or in final argument. Its admission therefore could not have served to influence the verdict of the jury. The error, if any, was harmless. R. 52(a), F.R.Cr.P.; *Addison v. U.S.*, 317 F.2d 808, 816-817 (5th Cir., 1963); and *U.S. v. D'Antonio*, 362 F.2d 151, 155 (7th Cir., 1966). In *D'Antonio* the Court noted that

"Unsubstantial error is not to be viewed in an attitude separated from reality and oblivious to the context of the record and as thus isolated



relied upon to furnish the basis for reversal. Otherwise, a judgment which could be affirmed would be almost impossible to achieve."

Similarly, in the words of the Supreme Court,

"We must guard against the magnification on appeal of instances which were of little importance in their setting." *Glasser v. U.S.*, 315 U.S. 60, 83 (1942).

#### IV.

#### **No Error Was Committed By The Trial Court In Permitting Redirect Examination By The Government On A Matter Initially Broached By Defendant On Cross.**

Although defendant has not chosen to assign as error the admission of certain of his post arrest statements, his repeated reference to same as violative of the *Miranda* rule and his request that they be considered by the Court in connection with those points specifically raised requires comment (D.Br. 9-10, 22-23).

Initially it must be noted that all post-arrest statements made by the defendant to Agent Moore were the subject of a successful motion to suppress (TR. 61-62). However, on cross examination, defense counsel inquired of Agent Moore as to the markup on the particular type of ten dollar note passed by the defendant (TR. 145). Agent Moore replied, "I can tell you what the defendant told me." Counsel affirmatively pursued the matter by asking "what

did he tell you?", whereupon Agent Moore replied, "It was the sale of \$65 on a hundred." No motion to strike was made, nor was any other curative action requested of the Court. On redirect examination, the Government was permitted to elicit the remainder of this conversation as it related to the price (TR. 146-152). Defendant recognized the propriety of this inquiry (TR. 148, 149), his only objection being that the scope of the redirect exceeded that of the cross (TR. 148, 149, 150). On the contrary, the only additional information obtained during this discourse was that defendant knew a man in Portland who offered counterfeit money at the above price and that he would be willing to introduce an agent to this source (TR. 149, 151). The foregoing amply demonstrates the redirect examination of Agent Moore was well within the confines of the cross and was properly admitted under the broad discretion of the trial court whose ruling thereon should not be disturbed on appeal unless an abuse of that discretion is manifest. *Chapman v. U.S.*, 346 F.2d 383, 388 (9th Cir., 1965), *cert. den.*, 382 U.S. 909; *Comine v. Scrivener*, 214 F.2d 810, 814 (10th Cir., 1954). For other cases on the permissible scope of redirect examination, see: *U.S. v. Allegretti*, 340 F.2d 254, 258 (7th Cir., 1964), *cert. den.* 381 U.S. 911; and *U.S. v. Gorman*, 355 F.2d 151, 160 (2nd Cir., 1965), *cert. den.* 384 U.S. 1024.

Under the general rule announced in *U.S. v. Evans* 239 F.Supp. 554 (E.D. Pa., 1965), affirmed 359 F.2d 776 (3rd Cir., 1966), *cert. den.* 385 U.S. 863, it is well settled that

“Where a witness has been cross-examined as to a part of a conversation, statement, transaction, or occurrence, the whole thereof, to the extent that it relates to the same subject matter and concerns the specific matter opened up, may be elicited on redirect examination.”

To the same effect see: *U.S. v. Donovan*, 339 F.2d 404, 410 (7th Cir., 1964), *cert. den.* 380 U.S. 975.

It is significant despite defendant's pious protestations of a violation of the *Miranda* precepts, *Miranda v. Arizona*, 384 U.S. 436 (1965), the point is neither assigned as error (D. Br. 10) nor urged as “plain error” under the terms of Rule 52(b), F.R.Cr.P. Aside from the obvious conclusion that the information elicited from Agent Moore on cross and redirect examination and the manner in which it was obtained inculcate no error, it is apparent defendant waived this point both at the trial and on appeal. (See Points and Authorities under Point I above.) It is respectfully urged therefore that it be rejected in its entirety.

It is also necessary at this juncture to clarify certain misconceptions arising from defendant's statement of facts and attendant specifications of error.



Defendant states that the counterfeit note (Govt. Ex. 1) passed in Salem was never introduced into evidence (D. Br. 6). The record reflects the contrary (TR. 93-94).

Defendant has also chosen to set forth certain portions of a conversation in which he allegedly engaged with Agent Moore following his arrest in Seattle, Washington (D. Br. 7-8). Although the initial recssitation of this conversation states it is the defendant's version (D. Br. 7), later excerpts (D. Br. 8) lead one to the erroneous conclusion that Agent Moore himself was the author of certain promises and inducements. Such is not the case; the various promises relating to parole (D. Br. 7) were the defendant's recollection of the conversation and were expressly denied by Agent Moore (TR. 44, 46).

Defendant's slavish devotion to the incident immediately preceding his arrest at the Caballero Tavern, Seattle, Washington (D. Br. 7-9) can only be characterized as a *non sequitur* since the statement he made at that time to Officer Halvorson was found to be inadmissible (TR. 115-116) and was never brought to the attention of the jury. *A fortiori* it is apparent it should not be considered on review.



**CONCLUSION**

WHEREFORE, on the basis of the above and foregoing, it is respectfully urged the judgment of conviction of the defendant be affirmed.

Respectfully submitted,

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**CERTIFICATE**

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated this 26th day of September, 1967.

**CHARLES H. TURNER**

*Assistant United States Attorney*

No. 21719, 21719A, 21719B, 21719C, 21719D

In the  
United States Court of Appeals  
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JOHN A. CROSS, et al., vs. S.S. KAIMANA, her engines, etc., et al.,	Appellants,  Appellees.	No. 21719
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JOHN A. CROSS, et al., vs. S.S. COAST PROGRESS, her engines, etc., et al.	Appellants,  Appellees.	No. 21719D

Brief of Appellants

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Brief of Appellants

STATEMENT AS TO JURISDICTION

The district court had jurisdiction over the parties and the subject matter of these actions pursuant to Article III,



Section 2 of the United States Constitution, 28 U.S.C. § 1333(1) (vesting district courts with jurisdiction to hear admiralty actions), and Rules of Practice in Admiralty and Maritime Cases, Rule 13; and in the case of Appeal No. 21719 pursuant to 46 U.S.C. § 951 (vesting jurisdiction in the district courts over actions to foreclose a preferred ship mortgage). No. 21719 - C.T. 1:23-25, 4:28-30; No. 21719A - C.T. 577:15-22, 578:30-31; No. 21719B - C.T. 668:8-14, 669:20-22; No. 21719C - C.T. 718:8-14, 719:20-22; No. 21719D - C.T. 767:8-14, 768:19-21.<sup>1</sup>

Appellate jurisdiction is conferred on this Court by 28 U.S.C. § 1291 (No. 21719 - C.T. 544-546; No. 21719A - C.T. 656-658; No. 21719B - C.T. 708-709; No. 21719C - C.T. 757-758; No. 21719D - C.T. 898-899).

### STATEMENT OF THE CASE

This proceeding involves appeals from final judgments entered in five libels *in rem* that were consolidated for trial in the court below. The five appeals have heretofore been consolidated by order of this Court.

Some of the pertinent facts appear in the Stipulation as to Certain Facts and Other Matters on file in 21719 (C.T. 273-291) and the Supplemental Stipulation of Fact con-

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1. We shall refer herein to the cases by the numbers given in this Court. The vessels, the district court case number and the appellate court numbers are as follows:

	District Court	Appellate Court
Kaimana (Philippine Bear).....	28019	21719
Lanakila (Indian Bear) .....	28026	21719A
Alaska Bear .....	28094	21719B
Pacific Bear (Lanakai).....	28107	21719C
Coast Progress .....	28223	21719D

tained in the Pre-trial Order in No. 21719 (C.T. 303:11-305:28). The balance of the facts appear from testimony, depositions and documentary evidence adduced at the oral proceedings. There is no real dispute as to the pertinent facts.

**The appellants are trusts, whose beneficiaries are seamen.**

The libels before this Court involve claims for wages of crew members of vessels who are beneficiaries of trusts that exist as conduits of deferred compensation to such licensed officers and unlicensed seafarers (seamen herein). The appellants are the trustees of fifteen trusts established by collective bargaining between Pacific Maritime Association (herein PMA) and the several unions representing crew members on American Flag vessels sailing out of California, Oregon and Washington ports. Four of the trusts (MMP-PMA Vacation Plan, MEBA-PMA Vacation Plan, ARA-PMA Vacation Plan and SIU Pacific District-PMA Supplemental Benefits Plan) provide vacation pay; four of them (MMP-PMA Pension Plan, MEBA-PMA Pension Plan, ARA-PMA Pension Plan, and SIU Pacific District-PMA Pension Plan) provide pensions; and seven of them (MMP-PMA Welfare Plan, MEBA-PMA Welfare Plan, ARA-PMA Welfare Plan, MSO-PMA Welfare Plan, SUP-PMA Welfare Plan, MFOW-PMA Welfare Plan, and MCS-AFL-PMA Welfare Plan) provide welfare coverage (with benefits in the forms of sickness, accident and disability compensation, medical and hospital care for seamen and their dependents, recreation and educational facilities, etc.). (C.T. 275:19-30).



**The appellees include five vessels.**

The five libels were filed *in rem* against five vessels. Pacific Far East Line (herein PFEL) and the United States represent the vessel interests.

Four of the vessel appellees were part of the PFEL fleet before being operated by Coastwise Line (herein Coastwise) and Dorama, Inc. (herein Dorama) and were later reacquired by PFEL. These are the Kaimana, known as the Philippine Bear while in PFEL service, the Lanakila, known as the Indian Bear while in PFEL service, the Lanakai, known as the Pacific Bear while in PFEL service, and the Alaska Bear. During March, April and May of 1957, PFEL sold these four vessels in order to obtain cash to enable it to discharge the obligation to acquire replacement vessels that it has under its subsidy contract with the United States (cf. 46 U.S.C. §§ 1111-1182). PFEL took back a preferred mortgage on each to secure the portion of the purchase price not paid at the time of the sale. With full knowledge of PFEL, the four vessels so mortgaged were thereafter bareboat chartered from this purchaser. Pursuant to such charters and with full knowledge of PFEL, each of the four was operated by Coastwise in its fleet. Similarly, with full knowledge of PFEL, three of them were chartered to Dorama and operated by it in its fleet. (C.T. 304:1-20).

The Kaimana, the Lanakila and the Lanakai were operated, first by Coastwise and later by Dorama, in the California-Hawaii trade until February, 1960 (C.T. 290:31-291:8). Thereafter, "preferred ship mortgages" on the Kaimana and the Lanakila were duly foreclosed by PFEL in proceedings below (C.T. 304:21-23). Appellees contend that these ship mortgages were valid liens against the vessels



and that the claims here at issue are not secured by a maritime lien (C.T. 295:15-23). PFEL continued to have a ship mortgage on the Lanakai while it was operated under bareboat charter by Coastwise and Dorama; however, PFEL repurchased the Lanakai from the buyer in February, 1960, after Dorama ceased operations (C.T. 304:21-23). As owner of the vessel, PFEL asserts that there is no lien against the vessel with respect to the claims here at issue.

Only one voyage of the Alaska Bear is involved in this proceeding. This was an offshore round voyage between February 1, 1959 and April 19, 1959 (C.T. 304:1-14). It had been repurchased by PFEL prior to this voyage and was bareboat chartered by PFEL to Coastwise for the voyage. The written articles are an exhibit in the proceeding Vessels' Ex. 2-A). As owner of this vessel, PFEL resists the claims as to the deferred compensation on the ground that they are not secured by a lien against the vessel.

The Coast Progress was formerly owned by the United States. It sold the Coast Progress to one operator, from whom Coastwise subsequently acquired it prior to the period here relevant. By agreement with the United States, Coastwise assumed the liabilities and obligations of the previous owner under the ship mortgage, and with full knowledge of the United States, it operated this vessel in the coastwise trade along the Pacific Coast of the United States. After the libel was filed, a libel in intervention was filed by the United States as mortgagee and assignee of preferred ship mortgages. It resists the claims at issue here on the grounds that it has valid liens against the ship and that the claims here at issue do not have the security of a maritime lien (C.T. 295:20-23; 304:24-305:9).

**Libels were filed to enforce the lien for wages of the crew of the vessel.**

Three of the appeals - 21719B (Alaska Bear), 21719C (Pacific Bear, formerly Lanakai), and 21719D (Coast Progress) - relate to cases begun by the trustees to enforce the historic maritime lien for wages of the crew of the vessel, which is a preferred maritime lien under 46 U.S.C. § 953. They were to collect the agreed value of the vacation pay, pensions and welfare benefit coverage payable for maritime services performed on each of the vessels by members of her crew (C.T. 666-697; 716-746; 765-798). The details as to this compensation were specified in collective bargaining contracts under which members of the crew performed their maritime services (C.T. 287:21-24; Ves. Ex. 2). These trustees intervened for the same purpose in the *in rem* admiralty proceeding involved in 21719 (Kaimana), which was instituted by Long Island Tankers Corporation to foreclose a preferred mortgage<sup>2</sup> (C.T. 61-100). Similarly, they intervened for the same purpose in the *in rem* admiralty proceeding involved in 21719A (Lanakila), which was instituted by Todd Shipyard Corporation to recover for ship repair and other services furnished the Lanakila<sup>3</sup> (C.T. 575-613). PFEL and the United States provided bonds to release the vessels. At this time only

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2. At the time of the filing of the libels Long Island Tankers Corporation was a wholly-owned subsidiary of Pacific Far East Line, Inc. (herein PFEL). In July, 1961 the former was merged into PFEL and the latter succeeded to all of its rights and assumed its obligations. Accordingly, for the sake of simplicity the designation "PFEL" as hereinafter used refers to both companies collectively as one and the same entity unless a differentiation is expressly made (C.T. 276:28-277:6).

3. Pursuant to stipulation the libel of Todd Shipyard Corporation was dismissed on July 1, 1960 (C.T. 646-647).



these two parties, the vessels and the trusts remain involved in this litigation.

In each of the five admiralty actions the District Court for the Northern District of California, Judge Sweigert sitting, held that the deferred compensation claims presented are not secured by the maritime lien for wages of the crew of the vessel. On this ground, the court below entered judgment dismissing the trustees' actions on the merits (C.T. 544-546; 656-658; 708-709; 757-758; 898-899). From each of these judgments the trustees have appealed (C.T. 547; 659; 710; 759; 900). The issue on these appeals is whether this lien is security for these claims.

**The seaman's employment contract sets out the many wage elements of the consideration for his performance of maritime services.**

The various items of compensation payable to seamen for their performance of maritime services aboard a vessel are specified - with some duplications - in a number of sources. One source is the shipping articles specified in 46 U.S.C. §§ 564, 713 Schedule A, or the other "sign-on" document where the statutory form of articles is not required (cf. 46 U.S.C. § 574). Other terms are in statutory provisions and customs. Terms from these sources and from the collective bargaining agreement make up the seaman's contract of employment (C.T. 287:11-24, 303:11-17; Trustees' Exs. 9 and 10).

The articles actually signed by the seaman are only a small part of the contract of employment under which he performs maritime services. As to compensation, the articles specify only the basic monthly wage paid to the seamen and set out archaic standard terms with respect to the food and other provisions to be carried and provided by



the vessel, as specified in 46 U.S.C. § 713 Schedule A. Even as to the food and lodging portions of his compensation, the seaman gets what is called for under the collective bargaining contracts, not what is called for by the articles. With respect to one voyage of one of the vessels here involved, the Alaska Bear, the execution of seamen's articles was required by law and the seamen were signed on by duly executing articles before the Shipping Commissioner (Vessels' Ex. 2-A). All other voyages of this ship and all voyages of the other four ships were in the coastwise trade between California and Hawaii (C.T. 303:22-25), or in coastwise trade along the Pacific Coast in the case of the Coast Progress (C.T. 305:1-3). As to these operations, a written document specifying the length of the voyage is all that is required by statute. (C.T. 290:31-291:3; also see 46 U.S.C. § 574).

The full terms of compensation for performing maritime services are provided in the collective bargaining agreement. The forms of this compensation include base wages, overtime pay, penalty time pay, penalty cargo pay, extra pay to non-watch standing crew members, extra pay in lieu of the time off, cash for subsistence should the ship be unable to provide the required meals, cash for lodging ashore should the ship be unable to provide the required lodging, transportation to the place of original sign-on, maintenance and cure, supplementary pay for serving meals to others than regular crew members and passengers, etc. The agreement furthermore sets out the applicable terms (for the individual's contract) covering the extra pay in case the vessel be ordered into war areas, the wages to be paid in case of detention should the vessel be captured by an enemy, and repatriation should the seamen be required to leave the vessel in a foreign port. Supplements to each

basic collective bargaining agreement specify the deferred compensation the crew member receives in the form of vacation pay, pensions and welfare coverage.<sup>4</sup>

These collective bargaining agreements are negotiated by PMA, for the employers, with seven unions representing 21,000 to 22,000 seamen.<sup>5</sup>

**The allocation of the seaman's wage dollar to the many forms of his compensation has been negotiated on a "wage package" basis.**

Over the years, seamen have negotiated higher wages for their services through collective bargaining (C.T. 288:15-17). The record shows the procedure. Shortly prior to the expiration of a current contract, their unions present

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4. The elements of the seamen's wages are listed in a government bulletin printed at pp. 6-10 of the Appendix to this brief.

5. PMA is a corporation composed of steamship operators and contract stevedoring concerns active in California, Oregon and Washington. PMA acts as agent for its steamship company members in negotiating with the labor unions referred to hereinbelow (C.T. 274:25-30). PMA represents substantially all of the major American Flag steamship companies operating out of the Pacific Coast ports, including PFEL (R.T. 70:15-17; Vessels' Ex. 2 p. 1).

Seven unions represent these seamen: International Organization of Masters, Mates & Pilots, West Coast Local 90 (herein MMP); Marine Engineers' Beneficial Association, Pacific Coast District (herein MEBA); American Radio Association (herein ARA); Marine Staff Officers' Union (herein MSO); and Seafarers' International Union of North America, Pacific District (herein SIU-PD), comprised of the Sailors' Union of the Pacific (herein SUP), and Marine Firemen's, Oilers' and Watertenders' Union (herein MFOW), and the Marine Cooks and Stewards Union-AFL (herein MCS). Licensed masters, mates and pilots employed on such vessels are covered by MMP. Licensed engineer officers on such vessels are covered by MEBA. Licensed radio officers are covered by ARA. Marine staff officers are covered by MSO (C.T. 274:31-275:16). SIU-PD is the certified collective bargaining agent for unlicensed seamen employed on vessels operating out of West Coast ports. Unlicensed seamen working in the deck department of such vessels are covered by SUP. Unlicensed seamen employed in the engine department of such vessels are covered by MFOW. Cooks and stewards and similar personnel, unlicensed, are covered by MCS.



the seamen's demands. These normally include demands for increases in basic wages, increases in other cash wage items, changes in working rules, establishment of or increases in vacation pay, pensions, welfare benefit coverage, etc. (R.T. 73:24-75:9). These demands are analyzed by employer representatives to determine how much each of them would represent as part of the wage costs of the vessels. Through negotiation, agreement between the seamen and their employers is reached on a total "wage package" cost. The union and the PMA then fit the various items into the agreed total cost (R.T. 75:10-76:5; C.T. 288:11-14).

In recent years agreement has first been reached on an overall "wage package" increase and thereafter the union has had the option to select the items to which the agreed wage increase would be applied (R.T. 76:14-23). At times a union would take nothing in increased basic wages but would apply the entire increase to one or more of the other items of compensation such as overtime pay, penalty pay, vacation pay, pensions and welfare. At other times a union would allocate a portion of the increase to basic wages, another portion to more vacation pay, another to increased pension, and another to improved welfare benefits (R.T. 76:24-77:4). Even where two or more unions negotiate the same "wage package" increase, they frequently have allocated it differently among the various items (R.T. 91:19-92:2; 96:18-97:17). This "wage package" bargaining has been the pattern of bargaining in the industry since 1951 (R.T. 77:4-8; and generally R.T. 71-99). A government study of the history and results is in evidence (See Ex. 2 to Trustees' Ex. 1; R.T. 50-56).

Through this bargaining the seamen have received an ever-increasing portion of their overall wages in vacation



pay, pensions and welfare benefits (C.T. 287 :29-32). In 1960 the total annual payments for these forms of deferred compensation by PMA employers was \$12,799,978.00 (Trustees' Ex. 6). This portion of the "wage package" represents close to 20% of the vessel's payroll cost (R.T. 81 :2-6).

**Wages of crew members are paid at various times and in a variety of forms.**

The procedures under which compensation is paid to the seamen seem complex to those not familiar with the ways of the sea. Seamen normally have substantial portions of their compensation paid to dependents, if they have any, through allotments from their wages (see Vessels Ex. 2-A). Similarly, by such allotments, the seaman can have portions of his wages paid into a bank account or savings account. This pay goes directly to the beneficiary or account, from time to time while the voyage carries on, without passing through the hands of the seaman himself (46 U.S.C. § 599). During the course of the voyage, the seaman normally takes a portion of his compensation currently by the purchase of articles from the vessel's slop chest, the price thereof being deducted from his cash wages (46 U.S.C. § 670). He also normally take a portion of his earned cash wages at ports of call from time to time during the voyage (46 U.S.C. § 597). At the conclusion of the voyage he will collect immediately the remaining amount of his undisputed base cash wages.<sup>6</sup> Portions of his overtime and penalty pay, etc., may be deferred until grievances with respect to these matters are resolved through regular processes of labor relations; cash payments in lieu of subsistence or lodging may be actually paid at the time the voyage is concluded or

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6. The time for payment of this portion of the wages is covered by 46 U.S.C. §§ 591-604, 641-644.

later on, particularly if there is a grievance (46 U.S.C.A. § 596, note 44). Compensation in the form of board and lodging, when provided in kind, is received on a regular day to day basis (cf. 46 U.S.C. §§ 660-1, 661-665, 713 Schedule A). Other items, such as repatriation, subsistence ashore away from the vessel, transportation and expenses in case of repatriation or other return to a home port, are usually paid either at the end of the voyage or at the time the facts calling for their payment occur (cf. 46 U.S.C. §§ 678, 679, 684, 685). A seaman who becomes sick or injured in the service of the vessel is entitled to maintenance (food and lodging) and cure (drug and medical expenses and hospital care) after he has left the ship while sick or injured. See 1 *Benedict, Admiralty* § 84 (6th ed. 1940).

Another substantial portion of the seaman's compensation is "received" by him as a consequence of withholding provisions of statutes and contracts. These prescribe that portions of his cash wages shall be withheld at the source. The employer has the obligation to transmit these sums to the federal government for income tax and social security tax purposes, to the State of California for unemployment disability coverage, and to the welfare plans that include provisions for contributions taken as deductions from wages otherwise specified as being payable to the seaman. The deduction and forwarding of such an amount constitutes payment of this portion of the compensation. So, too, is the deduction and forwarding of money to satisfy a court order requiring that part of a seaman's wages be paid for the support and maintenance of his wife and minor children (See 46 U.S.C. § 601).

The compensation involved in these appeals is deferred, like several of the items described above. Vacation pay is collected by the seaman at the time he wants this money



from his vacation plan. His pension is collected only after retirement and through his pension trust. His welfare benefits coverage is provided automatically, beginning when he becomes eligible for such coverage under the terms of his welfare plan. This coverage may continue for a period following his last day of employment (Vessels' Ex. 2).

**The trusts are the conduits through which seamen are provided and collect their vacation pay, pensions and welfare.**

The uniform practice in the employment of Pacific Coast seamen on American Flag dry cargo vessels is: (1) the crew member works under an employment contract that requires that he be provided vacation pay, pensions and welfare benefits, (2) the vacation pay, pensions and welfare benefits are provided through trusts established and existing on a multi-employer basis, (3) each ship operator is obligated to pay specified amounts into such trusts for each day that maritime services are rendered by each seaman, and (4) the trusts disburse therefrom the vacation pay, pensions, and welfare benefits to the individual seamen (C.T. 303:11-21).

These multi-employer—multi-seamen trusts exist to provide vacation pay, pensions and welfare benefit coverage so as to give the seamen the largest benefit for the portion of their wage package they assign to these wages. These plans take advantage of the cost savings involved in handling the deferred compensation payments on the basis of large groups of men, rather than on individual or small group arrangements. They also take advantage of the tax laws, which permit the employer's wage dollar to be paid into the plans without payment of any tax thereon by any seaman and which permit the plans to accumulate earnings on the trust fund during the period between the time the work



is actually done and the time the deferred compensation is picked up in cash, again without any payment of tax on these earnings as they are accumulated.

**The trusts have provided the deferred compensation due for the maritime services to the appellee vessels.**

The seamen on the five libeled vessels received the deferred wages they earned by the performance of their maritime services on these vessels (C.T. 538:20-26). The multi-employer—multi-seaman plans have paid all vacation pay, pensions, and welfare benefits claimed prior to the date of trial in the district court by seamen who served on the appellee vessels and made such a claim (C.T. 285:4-31). In no instance prior to the trial had an individual beneficiary of any of the trusts here involved been denied a benefit because of the fact that the particular sums sought to be recovered by the trustees in the present suits were not paid into the trust (C.T. 285:32-286:3).

**The deferred compensation has been reduced to money.**

The terms of the employment contract specified the amount and the form of payment to be made by the ship operator to provide the agreed deferred compensation. The amounts that the employer was obliged to pay have been called “contributions” (See Vessels’ Ex. 2 and App. to this brief, 11-22). As we shall explain more fully below, the seaman accrues a right to a quantum of deferred compensation day by day as he performs maritime services, and this daily accumulation has a value equal to the “contribution” due from the employer. The present value - as of the date that the maritime services are performed - of the cash that the seaman will eventually collect, at the time and under the conditions agreed upon, also equals the “contribution”

due. The trust documents, agreed to by the ship operator and the seaman, establish the mathematical equivalence of these values in money (See Vessels' Ex. 2). Accordingly, the amounts due to provide the agreed vacation pay, pensions, and welfare benefit coverage to the seaman who performed services on the libeled vessels are:

Trust	Balance due ex Kaimana, Lanakila, Pacific Bear and Alaska Bear	Balance due ex Coast Progress
MMP-PMA Vacation Plan.....	\$12,903.40	\$ 7,446.50
MMP-PMA Pension Plan.....	6,282.25	3,849.24
MMP-PMA Welfare Plan.....	1,744.37	572.97
MEBA-PMA Vacation Plan.....	29,439.25	10,436.00
MEBA-PMA Pension Plan.....	14,449.46	5,217.17
MEBA-PMA Welfare Plan.....	2,587.22	807.29
ARA-PMA Vacation Plan.....	4,041.65	1,368.10
ARA-PMA Pension Plan.....	1,764.90	694.10
ARA-PMA Welfare Plan.....	411.45	128.05
SIU-Pacific District-PMA Supplemental Benefits Plan .....	55,893.20	18,302.90
SIU-Pacific District-PMA Pension Plan.....	27,063.56	8,682.82
MSO-PMA Welfare Plan.....	1,066.20	271.20
SUP-PMA Welfare Plan.....	11,819.75	4,035.75
MFOW-PMA Welfare Plan.....	9,168.75	3,182.25
MCS-AFL-PMA Welfare Plan.....	9,602.69	2,777.79

The amounts are conceded to be valid obligations of Coastwise and Dorama to the respective trusts (C.T. 276:9-13). However, neither company now has any assets (C.T. 533:18-23).

### SUMMARY OF ARGUMENT

Members of the crews of five vessels performed maritime services over the period of about one year. The ship operator, in each case, failed to make the agreed payments to provide the vacation pay, pensions and welfare benefit coverage that were part of the agreed consideration for the services. The trusts set up by the seamen as the conduits for collecting these three types of deferred compensation provided it to the crew members. These trusts, appellants here,



thereafter filed libels *in rem* against each of the five vessels appellees here, to enforce the usual security, the lien for wages of members of the crew of the vessel. The district court refused to enforce the lien, permitting the vessel's owner or mortgagee to hold its interest in the vessel despite the failure of the vessel's operator to provide the agreed compensation to the crew members.

The standard admiralty law applicable is simple and well founded. The lien for wages of the crew of the vessel is security for all types of compensation. It is enforced, without regard to the form of the compensation, where it is shown (1) that maritime services were performed and (2) that the agreed compensation not paid by the vessel's operator can be reduced to money. Furthermore, the lien has been enforced, with uniform consistency, in suits instituted by the successor to the seamen's claims, that is whoever has provided the agreed compensation to the crew members, as readily as in suits by the individual seaman.

The district court erred in failing to follow this body of admiralty law and in following an erroneous decision of the Fifth Circuit. It did not find that either of the two ultimate facts establishing the lien was absent. It refused to follow the reasoning of the Fifth Circuit. It apparently was misled by the facts that American seamen have chosen to allot part of their "wage package" to these types of compensation prior to the impact of taxes and to collect this compensation through trusts, rather than by personal demand on the vessel's operator. They did so in order to have a safe and convenient way to collect the compensation when it is payable and to get, at that time, the most cash for the money they allot out of their "wage package" for this purpose. These facts do not justify the judgment below unless the long established admiralty law principles as to the lien for the crew members' compensation are reversed.



**ARGUMENT**

- I. The lien for wages of the crew of the vessel, which outranks the lien relied on by appellees, makes the vessel security for the obligation to provide vacation pay, pensions and welfare benefit coverage to the members of its crew.**

The lien for wages of the crew of the vessel is a development of admiralty jurisdiction with a long history. The lien makes the vessel security for the obligation to pay the wages of the crew of the vessel. In the appeals before this Court, federal jurisdiction exists because these actions are based upon the performance of maritime services by members of the crew of each of the vessels. The libels *in rem* were instituted to enforce the lien securing payment of the deferred compensation elements of the wages provided in the employment contracts under which this maritime service was performed.

- (a) Admiralty jurisdiction extends to all claims for compensation for the performance of maritime services.**

It is elementary that admiralty jurisdiction embraces claims for the agreed compensation of seamen for the performance of maritime services. The landmark case is *Harden v. Gordon*, 2 Mason 541, 11 Fed. Cas. 480 (Case No. 6,047, Circuit Court, Me. 1823). There a seaman sued for his expense in the cure of a sickness. The court held that he had a right "to be healed at the expense of the ship". Mr. Justice Story, after reviewing in great detail the history of the admiralty jurisdiction in a multitude of seafaring nations, states:

"... [T]he claim for such expense may be enforced in the court of admiralty. It constitutes, in contemplation of law, a part of the contract for wages, and is a material ingredient in the compensation for the labour and services of the seamen. The admiralty has a rightful jurisdiction over the subject of compensation of

seamen for maritime services, in whatever manner or form that compensation is to be paid, if it can be reduced to money." (11 Fed. Cas. 480, at 481)

- (b) The historical priority of the lien for wages of the crew of the vessel was preserved by the 1920 statute giving rank to the "preferred ship mortgage", the lien relied on by appellees.

Characteristic of admiralty jurisdiction are proceedings *in rem* against vessels. In order to make it possible to operate vessels in the course of foreign trade, numerous liens have been developed as part of the general admiralty law of nations. These liens arise without any participation of those having ownership interests in the vessel, for they arise from the operation of the ship not from contract. The priority of the lien for wages over all other claims, has long been accepted.

The rules as to priority of maritime liens have developed over many years of litigation. The general rule is that maritime liens rank in an order inverse to the order of their creation. *The St. Jago de Cuba*, 9 Wheat. 409 (22 U.S. 1824). Maritime liens are also ranked on the basis of their nature. In 1927 it was said that the following general statement as to order of priority, existing irrespective of time, was then in accord with the weight of authority:

"(1) Seamen's wages; (2) salvage; (3) tort and collision liens; (4) repairs, supplies, towage, wharfage, pilotage, and other necessities; (5) bottomry bonds in inverse order of application; (6) nonmaritime claims."

*The William Leishear*, 21 F.2d 862, 863 (D. Md. 1927)

The primary rank of the lien for seamen's wages was clear in 1811, when the High Court of Admiralty stated in *The Madonna D'Idra*, 1 Dods. 37, 40, 165 Eng. Rep. 1224, 1225:<sup>7</sup>

"Now, it must be taken as the universal law of this Court, that mariners' wages take precedence of bot-

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7. This opinion is printed in the appendix hereto.



tomry bonds. These are sacred liens, and, as long as a plank remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages. This is a principle universally admitted; and whoever enters into a contract, or advances money upon bottomry, must be presumed to do it with a full knowledge of the law upon this point."

In 1920 Congress enacted a statute giving an improved ranking to preferred mortgage liens, to make it more practical to borrow money for the purchase of vessels. The resulting rank placed them junior only to certain liens specified in 46 U.S.C. §953(a)(2), to-wit:

"... a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage".

The statute thus recognizes the admiralty principle that shipowners, or mortgagees who lend money on the security of ships, can permit other persons to operate them only with the knowledge that the ship itself becomes liable as security for all forms of wages of the crew of the vessel. They must be presumed to know that their claims against the vessel, whether as owners or as mortgagees, are junior to those for the seamen's wages.

**(c) Historically the maritime lien for wages is security for all of the seaman's agreed compensation for the performance of his maritime services.**

The American law as to the scope of the lien for wages of the crew of the vessel has been greatly influenced by the opinion of the English High Court of Admiralty in *The Madonna D'Idra*, 1 Dods. 37, 165 Eng. Rep. 1224 (1811). This case involved a libel *in rem* litigated by the Crown on behalf of a group of Greek seamen against a Greek vessel



that had arrived in London. They had been left destitute by the misconduct and disappearance of the master and the seizing of their ship pursuant to a libel *in rem* of the vessel filed by bottomry lien creditors. The Crown claimed on behalf of the "mariners" that they had a prior lien "to defray the charges incurred for their subsistence". The Crown further claimed that the lien being enforced for the payment of bottomry bonds should be subordinate to the lien for the subsistence in the same way as it admittedly was subordinate to the lien for cash wages. The court first stated the question as follows :

"The question is, whether he, as the agent of the bond holders, has a right to retain this money as against these mariners, or against the Crown, which stands in their place".

( 1 Dods. 37, 40, 165 Eng. Rep. 1224, 1225)

The court then posed a question as to whether the subsistence provided these mariners is to be considered as "part of their wages" protected by the lien. The court answered, after reviewing the facts before it :

"I think it is so to be considered ; it is wages paid in another form, it is part of the compensation for their labour ; and, according to the law of the country to which these men belong, subsistence in the intermediate times must be presumed to form part of the contract for the payment of wages".

(1 Dods. 37, 40, 165 Eng. Rep. 1224, 1225)

The court, upon finding the mariners' subsistence after sale of their vessel was "due to them by the universal usage and custom of their country or as forming part of the contract under which they sailed", enforced the lien for wages of the seamen. The court held that the proceeds of the sale of the vessel were "answerable for the subsistence as well as the wages of these mariners" (1 Dods. 37, 41, 165 Eng. Rep.

1224, 1226). It then ordered that the Crown, having furnished these seamen with the means of subsistence and having afterwards sent them to their own country, should recover "the charges incurred".

This opinion was quoted at length, and greatly relied upon by Mr. Justice Story in his opinion in *Harden v. Gordon*, 2 Mason 541, 11 Fed. Cas. 480 (Case No. 6,047, Circuit Court, Me. 1823), *supra*. This latter case, in turn, has been consistently cited in the admiralty decisions of the courts of the United States, from the district court level to the Supreme Court level. The basic principle there set down as to the lien for wages of the crew of the vessel remains the law today.

Over the past 150 years, the security of the lien for wages of the vessel's crew has been consistently enforced to require payment of a wide variety of forms of compensation other than the base wages set forth in the articles. In *The Herbert L. Rawding*, 55 F. Supp. 156 (E.D. So. Car. 1944), the lien was held to secure wages for extra hazardous service. The lien secures payment of maintenance to an injured seaman. *The Bouker No. 2*, 241 Fed. 831 (2 Cir. 1917). The share of the catch of seamen on a fishing vessel is secured by this lien. *The Georgiana*, 245 Fed. 321 (1 Cir. 1917). The lien for wages of the crew of the vessel secures payment of war bonuses not specified in the shipping articles. *Lakos v. Saliaris*, 116 F.2d 440 (4 Cir. 1940). *Glandzis v. Callinicos*, 140 F.2d 111 (2 Cir. 1944). The lien is security to collect wages for the agreed voyage when it is broken or abandoned. An admiralty proceeding *in rem* lies to enforce this lien to obtain from the vessel, or a fund representing the proceeds from the disposition of the vessel, the



compensation payable where she is idle due to no fault of the seamen. *Sheppard v. Taylor*, 5 Pet. 675 (30 U.S. 1831); *The Alanson Sumner*, 28 Fed. 670 (N.D.N.Y. 1886); *The William Leishear*, 21 F.2d 862 (D. Md. 1927); *Slavin v. Port Service Corporation*, 138 F.2d 386 (3 Cir. 1943). The lien secures the payment of agreed deferred compensation in the form of severance or discharge benefits. *Gayner v. The New Orleans*, 54 F. Supp. 25 (N.D. Cal. 1944).

The lien also extends, as the High Court of Admiralty pointed out in *The Madonna D'Idra* quoted supra, to wage obligations that are required by well established law. The courts have held that it is security for the statutory penalty of double pay for delayed payment of wages. *Collie v. Ferguson*, 281 U.S. 52 (1930), *The Chester*, 25 F.2d 908 (D.C. Md. 1928), *The President Arthur*, 25 F.2d 1002 (S.D. N.Y. 1926). The lien is also security for the statutory extra pay for improper discharge. *The Fort Gaines*, 18 F.2d 413 (D. Md. 1927), *The Great Canton*, 299 Fed. 953 (E.D.N.Y. 1924). It is security for the pilot's compensation under the contract that is implied by his offering to pilot a vessel into port. *Ex parte McNiel*, 13 Wall. 236 (80 U.S. 1872).

**(d) The lien exists where (1) maritime services have been performed, and (2) the compensation therefor is reducible to money.**

A detailed discussion of the applicable principles as to when the lien for wages of the crew of the vessel arises and what compensation is secured by this lien is set forth in the opinion of the district court in *Gayner v. The New Orleans*, 54 F. Supp. 25 (N.D. Cal. 1944). These principles establish that the performance of maritime services gives rise to the lien for the wages that are the agreed upon consideration for performing these services. They also establish that the lien exists to secure every obligation to provide compensation for such services that can be reduced to money.



**(1) Performance of maritime services gives rise to the lien to secure payment of the compensation.**

*The New Orleans* involved claims of seamen who worked on the San Francisco Bay ferryboats that subsequently went out of service following the building of the bridges. They had worked under an agreement specifying that the seamen, in consideration of continued performance of services, would be provided either dismissal compensation in cash or comparable employment. The seamen chose to take the money after they lost their jobs. The employer subsequently became unable to pay the money promised. Libels *in rem* were filed for the cash benefits. The court stated:

“Libelants contend that the benefit compensation . . . was earned by them contemporaneously with and as a part of their regular wages, by virtue of their service to the vessel, and that thereby there arose and became affixed to the vessel the right of maritime lien.”  
(54 F. Supp. 25, at 27)

The respondent contended that “such benefits are not in their nature such wages or compensation as entitle a seaman to a maritime lien”. The court rejected this contention and enforced the lien.

The court first considered the nature of the seaman’s lien. It stated that it “is a property right given by admiralty law that arises wholly and entirely as a result of services to a vessel” and that the amount earned for services rendered pursuant to a contract fixing the compensation is secured by a lien, automatically as a matter of admiralty law. The opinion continues:

“It is too well established to require substantiation by citation, that the fullest protection to seamen for *all maritime services* has always been the policy of the Admiralty. At one time or another different types and

kinds of seamen's labor or service have been the subject of adjudication in admiralty and always the courts have protected and enforced the seaman's lien, so long as it spells upon maritime services. It has never been the time, nature or extent of compensation which determines whether there is a lien, but always the test has been—has a maritime service been performed? *Harden v. Gordon*, 11 Fed. Cas. page 480, No. 6,047.”  
(54 F. Supp. 25, at 27-28)

The court then discussed the nature of the “dismissal compensation” claimed by the seamen who had lost employment. It first referred to the general recognition of the social and economic benefits of dismissal pay “by way of compensation against the hazard of future nonemployment” and the importance thereof in society. The court considered the analogy of the cases sustaining the lien for a seaman's compensation, paid over and above regular wages, for his agreeing to sail into war zones. The opinion quotes from *Lakos v. Saliaris (The Leonidas)*, 116 F.2d 440, 442 (4 Cir. 1940) (war bonus, *supra*):

“There can be no question but that the so-called ‘war bonus’ was additional wages for extra-hazardous service. It was awarded as the result of a demand for increased wages, and was paid for services rendered and for nothing else.”

The opinion then discusses the similarities to the situation before it, stating:

“Just as the seaman going into the war zone earned his compensation by agreeing to and actually serving under such hazards, so here the libelants each day and month and year of service pursuant to the agreement submitted themselves to the hazard of nonemployment and thereby, from and after the date of the agreement, earned, as a part of their wages, the benefits agreed to be furnished thereby.”  
(54 F. Supp. 25, at 28)



On the basis of the admiralty cases and principles discussed, the district court held that the seaman's lien did apply to secure recovery of the dismissal compensation benefits. This holding accords with the lengthy history, summarized above, of admiralty court *in rem* judgments enforcing the security of the lien for wages of all types of the crew members' compensation.

**(2) So long as the compensation may be translated into money or its equivalent, the lien is effective.**

Several courts, including the court below in the cases here on appeal (C.T. 537:15-539:3; 540:1-7), have considered claims that the crew members' compensation is uncertain in amount. This issue was before the Second Circuit in *The Bouker No. 2*, 241 Fed. 831 (2 Cir. 1917). The court enforced the maritime lien as security for maintenance and cure. The lien was enforced as to a period extending beyond the period of the voyage and thus after the termination of the obligation to pay base wages. That court had no difficulty with the claim of uncertainty, saying at 834-835:

"The demand [for maintenance and cure] constitutes a lien, not for any specific sum of money, but for whatever reasonable sum may be appropriate to discharge that lien, which lien arose once and for all, and in its entirety, when the mariner became ill or wounded in the ship's service. It is nothing against a lien that it cannot be admeasured when it attaches, if suit can liquidate it; and in respect of this lien it is more accurate to regard items arising after voyage ended, not as new demands but as existing, but inchoate or unliquidated, at date of lien; i.e., of illness or wound."

In *The New Orleans* it was argued that the maritime lien did not arise because the consideration for the maritime services might have been provided in form of other employ-



ment, rather than provided in the form of cash. The court disposed of any claim of uncertainty, saying:

“So long as the compensation may be translated into money or its equivalent, the lien is effective. Mere uncertainty or difficulty in calculation does not destroy the right. Equity will provide the means for ascertainment of amounts.”

(54 F. Supp. 25, at 28)

It was also urged that the dismissal compensation benefits might never be received. The court rejected this argument.

**(e) The lien for wages of the seaman is not personal to him but may be enforced by anyone who advances his wages to him.**

The admiralty law has been clear for many years that the lien for wages of the crew of the vessel does not provide security that can be enforced only by the seaman. *The Madonna D'Idra*, supra, 1 Dods. 37, 165 Eng. Rep. 1224, involved Greek seamen who were stranded in England when their ship was seized by the Admiralty Court to satisfy the bottomry lien creditors. The King's Proctor intervened “on behalf of the mariners” to recover for the Crown “the charges incurred” in providing subsistence to “these mariners” in England and in providing their repatriation to Greece. The court had no problem with the fact that the seamen had already received this “part of the compensation for their labour” and were not personally in court. It ordered that the proceeds of the ship were to be used, first, to reimburse the Crown for “the charges incurred” in providing this compensation to the Greek seamen.

The principle that he who provides the money for wages gains the security of the lien has been frequently applied in American courts. It has consistently been held that an assignee who pays the seaman his wages has the security for them. *The New Idea*, 60 Fed. 294 (S.D. Miss. 1892); *The William M. Hoag*, 69 Fed. 742 (D. Ore. 1895) where the court pointed out that assignability "enhances its value"; *The Staghound and the Gamecock*, 97 Fed. 973 (D. Ore. 1899) where the court said it would be "inequitable" to deny the lien to the assignee; *The President Arthur*, 25 F.2d 999 (S.D. N.Y. 1928).

In *Fielder v. Bay Construction Co.*, 5 F.2d 227 (5 Cir. 1925), Bay Construction Co. had advanced money on the request of the vessel's owner, to be used in paying the wages of a dredge's crew, and it was actually so used. A libel was filed and the dredge was sold; however, the purchase price was insufficient to satisfy in full the claims of all of the libelants. The court held that Bay Construction Co. "became entitled by subrogation" to the lien for the wages and had a preferred position superior to the lien of others.

Another person who had provided wages recovered in *The Bergen*, 7 F.2d 379 (S.D. Cal. 1925). Intervenor Farley claimed a lien on the basis that money had been obtained through his endorsements of notes, "which he endorsed solely upon the credit of the Steamship Bergen and solely for the purpose of paying the wages of the crew of said vessel". The money obtained was actually used to pay the

wages of this crew. The court held, "Under these circumstances, Farley is entitled to the same status and priority as any other person who advances money to pay the wages of the crew. . . . His lien takes precedence and is given priority over liens of other intervenors and libellant herein."

In *Brock v. The Southhampton*, 231 F. Supp. 280 (D. Ore. 1964), a bank had issued a letter of credit to an agent of the crew "to assure payment of crews' wages and other compensation as these obligations arose". The court found, "The letter of credit was drawn on, and wages and other compensation paid, only after they were earned." The court stated the applicable principle as follows:

"Under the maritime theory of advances, one who pays the claim of a maritime lienor is entitled to the rights previously acquired by the lienor." (231 F. Supp. 280, at 282)

In a related case, *Brock v. The Southhampton*, 231 F. Supp. 283 (D. Ore. 1964), a similar letter of credit was issued by a bank "to compensate engineering personnel of the S.S. Southhampton". On the same basis the court enforced the lien and entered judgment for the bank.

**II. The seamen employed on the libeled vessels performed maritime services under contracts specifying that their compensation was to include vacation pay, pensions, and welfare coverage. This compensation has been reduced to money; the seamen have received it.**

Maritime services were performed by crew members of each of the vessels libeled. The contract of employment governing the performance of these maritime services specified that part of the consideration therefor was the provision of vacation pay, pension, and welfare benefit coverage. The compensation in each of these forms has been reduced to money. It has been received.



- (a) The admitted facts are that maritime services were performed for the ships libeled and that the deferred compensation here involved is due as part of the consideration for the performance of these maritime services.**

The record, as to each of the appellee vessels, is simple in its relevant facts. Maritime services were performed by seamen aboard the vessel. The agreed compensation included the many forms enumerated in the statement of facts, *supra* 7-9. As part of the consideration for the performance of maritime services the vessel's operator was obliged to provide vacation pay, to provide pensions and to provide welfare benefit coverage. It agreed to do so by making payments, called "contributions", into appellant trusts, which would pay the deferred compensation.

- (b) These elements of deferred compensation are now normal and usual elements of the consideration agreed to be paid for the performance of maritime services.**

The history of seamen's wages, like the history of wages of other segments of the economy, has shown a steady broadening of the types of compensation that make up the consideration for the performance of work. Thus, as we have pointed out at 8-9 *supra*, basic cash wages are supplemented by many forms of direct cash and fringe benefit compensation. Maritime collective bargaining during the past 20 years, has added vacation pay, pensions and welfare benefit coverage to the pre-existing wealth of fringe benefits included in the wages of crew members (See 9-11 *supra*).

Seamen have decided that they will work for less cash pay than they would have received had they not taken significant portions of their wages in the form of provision of vacation pay, pensions and welfare benefit coverage. The contracts stating the consideration for the performance of maritime services have specified the various forms of compensation to be provided. American ship operators have agreed that the wages of the crew of the vessel will be allocated in this way.

The broad extent and the importance of fringe benefits in employment relationships in this country are well known. A 1958 report of the Senate Committee on Labor and Public Welfare (Senate Report 1440, 85th Congress, 2d Session) contains the following statement:

“In little more than a decade private employee welfare and pension plans have grown from relatively small significance to a position where approximately 84 million persons are depending in some manner upon the benefits which they promise. . . . Regardless of the form they take, the employers’ share of the cost of these plans or the benefits the employers provide are a form of compensation.” (pp. 3, 4).

The Welfare and Pensions Plans Disclosure Act enacted August 28, 1958 (Public Law 85-836, 85th Congress; 72 Stat. 997) contains the following statements in Section 2a:

“The Congress finds that the growth in size, scope, and number of employee welfare and pension benefit plans in recent years has been rapid and substantial; that the continued wellbeing and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and successful development of industrial relations; that they have become an important factor in commerce. . . .”

With respect to a pension plan the Seventh Circuit, in *Inland Steel Co. v. National Labor Relations Board*, 170 F.2d 247, 251 (C.A. 7, 1948) quotes with approval a pertinent observation of the National Labor Relations Board:

“... Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure. . . .”

Congress has also realistically appraised the situation by amending the Davis-Bacon Act so that fringe benefits are now part of the wages that government contractors must



pay to equalize their wage payments with those of outside contractors for the same kind of work in the same area. 40 U.S.C. § 276a (b). Similarly, the Miller Act, 40 U.S.C. § 270b (a), dealing with sureties guaranteeing that “every person who has furnished labor” used in performing a contract with the United States shall be paid what is “justly due him”, has been held to impose liability on the surety to the plans for “fringe benefit” contributions. *United States v. Carter*, 353 U.S. 210 (1957).

The maritime arm of the United States recognizes that vacations, pensions and welfare benefit coverage are integral parts of the seamen’s wage structure. In its administration of the operating-differential subsidy (see 46 U.S.C. § 1173) it has issued *U.S. Dept. of Commerce Maritime Administration*, “Manual of General Procedures for Determining Operating-Differential Subsidy Rates”. This controlling document states in part:

“Wages consist of the fair and reasonable cost of payments made by the operators directly to or for the benefit of (to the extent indicated below) members of the crew complement and relief complement of subsidized vessels for services rendered and required for the efficient and economical operation of such vessels, provided that they are not recoverable from shippers, receivers or other third parties.

Crew complement shall be construed to mean, in addition to the master, those officers and ratings approved by the Federal Maritime Board as being eligible for rate-making purposes. Relief complement shall be construed to mean those officers and ratings assigned to relieve in port members of the crew complement.

“A. *Payments Eligible for Rate-Making and Subsidy Payment Purposes.*

“1. Base Wages.

“2. Overtime, including penalty time pay.



- “3. Vacation pay (earned in subsidized services) including contributions to union vacation funds.
- “4. Penalty cargo bonuses.
- “5. Area bonuses.
- “6. Non-watch pay.
- “7. Tool allowances.
- “8. Pension, welfare and unemployment fund contributions.
- “9. Payroll taxes.
- “10. Clothing allowances, as distinguished from uniform allowances.
- “11. Payments to Masters and Chief Engineers for shifting ship.
- “12. Passenger allowances to Stewards Department on freighters.”

In short, the Maritime Administration defines seamen's “wages” as the *“cost of payments made by the [vessel] operators directly to or for the benefit of . . . members of the crew”* in many forms including (3) “contributions to union vacation funds” and (8) “pension, welfare and unemployment fund contributions”.

**(c) The trusts have provided the deferred compensation of the crew members.**

Each of the trusts was set up for the specific purpose of being the conduit for the deferred compensation here involved. They have the purpose of providing the highest benefits for the wage dollar that the seaman has allocated to these forms of deferred compensation. They exist to handle the mechanics of getting the actual deferred wages into the pockets of the seamen so that they will receive these parts of the compensation for their maritime services. The seamen chose to set them up for this purpose. The multi-employer arrangements are in accordance with the general usage and customs of the country. These trusts effectuate the seaman's assignment of a substantial portion of his pre-tax “wage package” dollar to these forms of deferred compensation.

The trusts have provided the deferred compensation due to the crew members of appellee vessels as consideration for their maritime services. Each trust has confirmed in full the legal right of every seaman on these vessels to receive the agreed deferred compensation therefor in accordance with the terms specifying it. Thus the trusts have provided the consideration for the performance of maritime services. The seamen earned and have received from the trusts a day's credit towards their deferred compensation payments for each day that they worked. Furthermore, every amount that has been payable has been disbursed (C.T. 285:4-31). It has been stipulated that every payment will be made (C.T. 285:32-286:3; 290:14-30). The court below proceeded on this basis (C.T. 538:20-26). These appeals therefore are argued on this basis of its being an agreed fact that all of the deferred compensation earned by maritime services on appellee vessels has been provided by the trusts.

- (d) The deferred compensation, for which the vessel operators have failed to provide and for which the vessels are security, has been reduced to money.**

The value of each of the three types of deferred compensation has been determined in money in accordance with standard mathematical procedures. This has been done through actuarial science and studies, in accordance with the provisions of the plans (See Vessels' Ex. 2). Standard mathematical procedures for such purposes, recognized by the courts, are used. The number of days that a seaman performs the maritime services is the common denominator. The value of the deferred compensation as of the date the seaman performs his maritime services equals the cost to the employer for that day's work, as specified in the terms of the employment contract, the "contribution" due and owing. This is true whether what he receives be viewed as the immediate quantum he then receives in the form of a right to



cash later or if it be viewed as the amount of cash actually received later discounted into a value as of the date that the services are performed. The rate of the daily contribution into each plan constitutes the money value mathematically or actuarially computed, as of the day that services are performed, of the deferred compensation that the employer agrees to provide to the seamen for such services.

**III. The court below accepted the legal principles set out in I and the facts set out in II but erroneously distinguished these principles.**

The opinion below accepts the legal arguments we have set forth in I, 17-28 *supra*. It summarizes the applicable law as follows:

“Admiralty courts have not limited the seaman’s lien claim to those for ordinary wages. On the contrary, the Courts have recognized the seaman’s lien claim for compensation for maritime services regardless of the form of the compensation provided only that the claim is reducible to money. See *Harden v. Gordon*, 11 Fed. Cas. 480 (No. 6047) (C.C. Me. 1823). From the earliest period of maritime commerce the test in admiralty courts for determining whether there is a seaman’s wage lien has been: Has a maritime service been performed? If such service has been performed, then whatever constitutes the compensation for the service, if reducible to money, may be enforced by a maritime lien against the vessel upon which those services were performed.

\* \* \*

“It is well established that an assignee (and, we assume, a trustee) of a seaman may enforce the wage lien of the assignor or beneficiary.” (C.T. 535:14-26; 540:13-15)

The district court, although also agreeing that the facts are as we have summarized them in II, 28-34 *supra*, nevertheless concludes that this body of admiralty law is not governing, apparently on the three grounds: (a) no lien exists for that part of a seaman’s compensation that is paid



to him through a trust, (b) the crew members have received their compensation, and (c) other courts have denied the lien.

**(a) The lien exists for seamen's compensation payable through a trust.**

The fact that the seamen chose to collect their deferred compensation through the form of trusts is seen, by the court below, as a basis for concluding that the cases enforcing the lien for wages of the crew of the vessel can be distinguished. Thus it states:

“In each of the cases above mentioned, the compensation in question had become due to the seamen and *the only question was whether the form of the compensation was such as to bring the claim within the protection of the seaman's maritime lien.* [Emphasis added.]

“In the pending case the contributions in question are due and payable, not to the seamen, but to the trustees.

\* \* \*

“Those contributions are a means of financing the trust funds.” (C.T. 537:2-8; 539:1-2).

In short, the court finds support for its conclusion, and for its decision, in the use of trusts to provide the compensation to the seamen and in various ordinary characteristics of multi-employer deferred compensation trusts (C.T. 537:7-540:7). These characteristics all are embraced within the following facts: (1) money is put in the trust with respect to the employment of many crew members of many vessels, at prescribed rates per day of maritime services performed, (2) money is later collected from the trust by crew members in the manner, at the time, and subject to the qualifications that are stated in the contract of employment, and (3) the mathematical relationship between the wages paid in and the wages paid out is an actuarial one. *We urge that the court's conclusions from the facts and its reasoning do not justify the decision reached below.*

In deciding the case on the hypothesis that the money paid in goes to a trust and not to the seaman directly (C.T. 537:7-8) and hence is “a means of financing the trust funds” (C.T. 539:1-2), the court below exalts form over substance.

The use of a trust does not exempt the vessel from its lien. Thus, if all the seamen beneficiaries of each trust had acted in accordance with the formalities of 46 U.S.C. § 599 to allot to that trust enough money from their cash wages to provide the deferred compensation it distributes, the vessel clearly would be security for the sums payable to the trust. Even if these allotments were the only payments made for any day of maritime services to provide this compensation and even if the seamen had chosen to use a multi-employer—multi-seaman trust to distribute their deferred compensation, the trustees acting for the seamen beneficiaries of the trust could enforce the lien for the crew members’ wages. In this example we find the same characteristics of multi-employer—multi-seaman trusts as are referred to in the opinion. The lien, nevertheless, stands as security. It is therefore clear that the court below erred in concluding that these characteristics freed the vessel from liability for the deferred compensation paid through this ordinary type of conduit.<sup>8</sup>

The example we have given differs from the situation before this Court only in one aspect, the effective time of the allotment. In collective bargaining, the seamen allotted

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8. Other portions of the seaman’s wages also flow through outside conduits and not through the seaman’s hands. This is true, for example, as to taxes withheld, allotments to his dependents, and payments to meet court orders for support of his children. See 11-12 *supra*.



dollars in the “wage package” *before* they became subject to income and employment taxes, directing that part of this “wage package” money be diverted from possible use as immediately available cash wages and be put into deferred compensation. As we have seen, the seamen made this choice to get the most “take-home” in deferred compensation from the dollar that the seamen allocated out of their “wage package”; the trust form was used to take advantage of the tax laws and the savings arising in using group, rather than individual, plans. See 13-14, *supra*. Congress has found these plans to be socially advantageous. See 30-31 *supra*. The court, however, failed to appreciate the cogent reasons for using these trusts and found significance only in their form. For this reason, it was led into the incongruity of holding that the use of the trusts caused the forfeiture of the lien for wages of the crew of the vessel.

It also appears that the court below was bothered by the fact that it did not see the direct actuarial relationship between, on the one hand, the payment by the employer into the trust and, on the other hand, the daily accumulation of rights to get money from the trust and the payments thereof (cf. C.T. 537:7-538:30). As we have indicated above - pages 14, 33-34 - there is no real problem in translating the benefits to be received into money as of the date that the work is performed. There is a direct relationship between the obligation to pay money in and the right to take money out, which is based on the common factor of measurement by days of work, with the usual adjustments for the actuarial factors that refine this direct relationship to reflect the occurrences between the date the work is done and the date cash is collected as deferred compensation.

The various elements of the opinion below that we have discussed are gathered together in the district court's



conclusion that the trustees' claims were not of such a nature as to be secured by the maritime lien for seamen's wages (C.T. 536:30-539:7). The court below seemed to have believed that the payments into the trust are not compensation to the seaman, and that only the disbursements from the trust are of this character. But surely the money does not acquire a different character while it is held in the trust. The money is compensation from the time it is paid, in ordinary course, by the employer. The only problem is one of following the mathematics explaining the obvious relation between cash flow in and out of the trust.

The court below, in asserting that the sums sought by the libels "are owed only to the trustees - not to the seamen" (C.T. 540:20), failed to perceive the fact that the trustees were not suing for themselves, but for the seamen, the beneficiaries of the trust. The trust documents, excerpts from which are set forth in the appendix at pages 11-22, demonstrate that the trusts were set up by the seamen for their exclusive benefit. Any failure to pay money into the trust reduces the amount available to pay the seamen their deferred compensation. If all employers failed to pay, the seamen could recover their wages only from the vessels. The lien may be enforced whether one or many employers fail to pay into the trust.

**(b) Payment of the agreed compensation has not extinguished the lien.**

The court below also relies on the fact that the trusts actually provided the deferred compensation although the money for it may not have been received (C.T. 539:22-540:6). This fact in no way precludes the enforcement of the lien by the trustees, who are the trustees of the crew members. Rather, the fact that the seamen have received this compensation from the trusts is one basis for the right

of the trustees to enforce the lien for wages of these crew members. The trustees have provided the compensation that the employment contract states shall be provided. Having provided such compensation, they are entitled to sue for the value of it.

The court below, however, would draw the opposite conclusion from the trusts' having provided the compensation. Thus it holds that the trustees' claims should be denied on the theory they are made to protect other steamship companies against their having to pay the compensation of the crew members of the libeled vessels (C.T. 539:24-28). There is no validity in this theory. But even if there were, the lien is available to whoever provides the money that is received by the seamen as their compensation for their maritime services. This is one of its attributes making it such valuable security (See 27-28, *supra*.)

**(c) The decision below seems to be based upon acceptance of erroneous and inapplicable precedents in the opinions of other courts.**

The opinion below refers to three lines of authority. The principal support is said to be in *Brandon v. The Denton*, 302 F.2d 404, 415-416 (5 Cir. 1962) and cases based on it.<sup>9</sup> The opinion also relies on a Supreme Court opinion in the bankruptcy field, *United States v. Embassy Restaurant*, 359 U.S. 29 (1959). Finally, it distinguishes the decision of the United States Supreme Court in *United States v. Carter*, 353 U.S. 210 (1957).

The invalidity of the *Denton* opinion, which is the precedent principally relied on below, is patent. The fundamental basis of the *Denton* opinion is its premise that the lien for

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9. *Barnouw v. The Ozark*, 304 F.2d 717 (5 Cir. 1962); *Irving Trust Co. v. The Golden Sail*, 197 F.Supp. 777 (D. Ore. 1961).



wages of the crew of the vessel extends only to the wages specified in the shipping articles. This premise is fallacious.

This error arose, we submit, because the Fifth Circuit found its meaning for the word "wages" in numerous provisions of Chap. 18 of 46 U.S.C. Among these are provisions calling for the use of shipping articles in offshore trades and for penalties for failing to use these (46 U.S.C. §§ 563-573) provisions requiring an agreement with every seaman on coasting voyages "declaring the voyage or term of time for which such seamen shall be shipped" and penalties in regard thereto (46 U.S.C. §§ 574-578), provisions as to when wages commence, when they are terminated, time for payment, advances and allotments, and other details as to the computation and payment of cash wages (46 U.S.C. §§ 591-605), provisions as to unclaimed wages (46 U.S.C. § 628), and as to the accounting as to wages and the rules for settlement, including the payment of wages, the execution of mutual releases of all claims, and for issuance of discharges or maintenance of continuous discharge books (46 U.S.C. §§ 641-646). From these provisions, it concludes that the wages protected by the lien are those set forth in the articles. *The fallacy is that these sections have nothing to do with the lien.*

Actually, the lien for wages of the crew of the vessel was not established by statute. Although the *Denton* opinion does refer to the fact that this lien has had a long history, the language in the opinion directly implies that its availability must depend on the 1872 statute, which is the basis for the provisions in Chap. 18 of 46 U.S.C. referred to above, or else on the 1920 statute provisions now in Chap. 27 of 46 U.S.C., which gave ranking to certain ship mortgages. This position is utterly without merit. The lien is a development of the admiralty law of many nations over



many years and the lien applies to all forms of compensation; see *supra* 19-26. *Denton* was wrongly decided; it should not be followed.<sup>10</sup>

The court below also relies on the *Embassy Restaurant* case. The Supreme Court opinion makes it clear that it is based upon specific language in the bankruptcy statute. This statute, in rather sharp contrast with admiralty principles, protects wages only if due to the individual worker and only if earned within a short period prior to the bankruptcy proceeding. The inapplicability of the bankruptcy four months' period to admiralty law is apparent from the fact that a single voyage of a vessel may readily extend beyond the four-months period.<sup>11</sup> The bankruptcy court proceeds on a fundamental principle as to wage payments that is directly contrary to the fundamental principle of admiralty law as to wages.

Admiralty law places the liability for wages, all wage liabilities, ahead of all other claims. The fundamental purpose of the admiralty principles as to wage claims is to assure that they will all be paid and that the vessel will be security

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10. The explanation of the *Denton* decision, we believe, lies in the failure of counsel to present the admiralty law to the court. We have reviewed the briefs filed there, and find that this body of law was not presented for the consideration of the Court of Appeals. Similarly, it would appear that the Court was not advised that little of the employment contract is set forth in the shipping articles.

In the alternative, the decision in *Denton* may have been based on the unusual fact that the suit there was brought on the collective bargaining agreement, which included specific language negating the availability of an admiralty remedy. See 302 F.2d at 415.

In addition, it is noteworthy that the opinion below rejects the *Denton* reasoning, for it recognizes that the long history of admiralty wage lien cases does not permit a holding that the lien is limited to wages specified in the shipping articles.

11. The articles for the *Alaska Bear* were for a period of nine months. See Vessels Exhibit 2A.

for them before it is security for any other payments. Thus, the admiralty law as to wages is fundamentally directed at protecting in full the seaman's right to all of his compensation. The bankruptcy law, in contrast, is directed at affording relief to the individual who is in debt and at providing some reasonably fair distribution of the assets of the debtor among the various claimants to them. The concept of full payment of all wage claims, prior to any payment of any other claims, is in direct contravention to the bankruptcy law. For this reason, as well as for the reason that unique statutory language and legislative history in the Bankruptcy Act was involved in the *Embassy Restaurant* case, this opinion is of little significance in determining the admiralty law.

The opinion below also errs in distinguishing the Supreme Court holding with respect to the Miller Act in *United States v. Carter*, 353 U.S. 210 (1957). We submit this opinion is of much more relevance to admiralty law than the Bankruptcy Act opinion. The Miller Act provided that a surety on a government contract, where the statute provides that everyone who furnishes labor shall be able to sue for what is justly due to him, makes the surety liable to the deferred compensation trusts for the employer contributions due to provide the deferred compensation on public contracts. Here, as in the case of the admiralty law, the purpose is to protect the worker and to see that he shall have the benefit of all of the compensation. Here there is no limitation to the wages "due to him". The fundamental purpose of the Miller Act, like the maritime lien for wages of the crew of the vessel, is to guarantee payment of all compensation. In these circumstances, the form of payment-through trusts in which the wage money is held and earns



interest during the period between the time the work is performed and the time actual cash is drawn down - is of no consequence. We submit that the Miller Act decision relates to a problem much more like the admiralty law problem than a bankruptcy problem and for this reason should have been followed and the *Embassy Restaurant* holding distinguished in determining the availability of the maritime lien for the wages of the crew of the vessel.

### CONCLUSION

The admiralty courts have enforced the lien for wages of members of the crew where there have been no articles signed by anyone, where the obligation to pay a particular item of compensation is shown by well-established custom, where the obligation is set forth in a statute, where it is implied from a statute, where the obligation is set forth in collective bargaining agreements, where it is stated in the articles, or where in any other way it is determined that the compensation is a material element of the compensation for maritime services. The lien has extended to all items of compensation, in whatever manner or form the compensation is to be paid, if it can be reduced to money. This is true even if it is inchoate or unliquidated at the time the services are performed, provided it can be liquidated by suit. It is available not only to the seamen, but to whoever provides the compensation to the seaman. The purpose of the maritime lien for wages of the crew of the vessel is to assure that the vessel shall be responsible for all payment of compensation to all seamen. Unless the body of admiralty law - developed over many decades - is now to be over-ruled, the



decision below must be reversed with directions that judgments be entered enforcing the lien against the vessels and so requiring payment to the trusts of the sums prayed for in the libels.

Respectfully submitted,

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#### **CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD ERNST

**(Appendix Follows)**







## *Appendix*

*165 English Reprint 1224*  
**THE "MADONNA D'IDRA"**

### **1 Dodson's English Admiralty Reports 37**

[37] "MADONNA D'IDRA"—(Papaghica). [High Court of Admiralty] April 30, 1811.—Mariners wages take precedence of bottomry bonds—Subsistence part of wages—In cases of Greek navigation mariners to be subsisted till conveyed back to their own country.

This was the case of a Greek vessel, which brought a cargo of cotton, wool, and fruit, from Smyrna to London, where she arrived in February 1810, and discharged her lading. In the month of May, in the same year, a warrant was issued to arrest the ship, at the suit of Mr. Hansen, of London, the holder of two bottomry bonds. A memorial having been presented to the Earl of Liverpool, one of the Secretaries of State, by twenty-five of the mariners, part of the crew of this ship, stating that they had been defrauded of their wages by the captain, and were left destitute of support, the King's Proctor received directions from the Secretary of State's office to take such steps as might be requisite to recover the wages due to the memorialists who were, in the meantime, furnished with the means of subsistence, and afterwards sent to their own country by His Majesty's Government. In consequence of the directions thus received, the King's Proctor intervened in the cause on behalf of the mariners. Mr. Hansen, the holder of the bonds, and consignee of the cargo, consented to pay the wages due to these men, but declined to defray the charges incurred for their subsistence. The ship was sold under a decree of the Court, and the proceeds brought into the registry, but the amount was not sufficient to satisfy the demands of the mariners and of the bond holder.

On behalf of the mariners it was contended, that they were entitled to priority of payment, and that the [38] money expended for their maintenance ought to be defrayed out of the proceeds of the ship in the first instance; and if that should prove insufficient, then out of the freight which was in the hands of Mr. Hansen.

On the other side it was submitted that the proceeds of the ship ought to be applied in payment of the bottomry bonds, in preference to all other demands, the wages having already been paid.

*Judgment—Sir. W. Scott:* This is one of those cases which are almost unavoidably involved in considerable mystery, and attended with great confusion and embarrassment upon the question of law arising on the facts, taking them to be ascertained; for it is a question of Greek navigation, which must depend in a great degree upon the customs and regulations of a foreign country, the exact state of which it is extremely difficult to ascertain. I may add, likewise, that it is a case in which the Court finds it by no means an easy task to obtain a correct and satisfactory statement of facts.

It appears that the ship sailed from Smyrna, at which place the master had taken up money on a bottomry bond; that in the course of her voyage she had put into Malta, where the master again procured money by means of another bond; and that she had since arrived in the port of London. What may be the original ground of dispute between the master and the crew *non constat*. No reason has been assigned for the quarrel, so that I am totally at a loss to discover what has led to it. The Court cannot find out which of the parties is the wrong-doer; whether there is a cause of

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forfeiture of wages on the part of the mariners, or [39] whether the misconduct of the master should entail any inconvenience on his owners.



It appears, that after the arrival of the ship in this country, Mr. Hansen, of this town, with perfect propriety, took out a warrant to arrest this ship, in order to obtain payment upon the bottomry bonds; and that a quarrel arose between the master and crew, which led to the probability that the ship might be left here in a state of distress. The ship has since been sold, under the directions of this Court, and the proceeds of the sale have been brought into the registry. In the meantime the sailors applied and proceeded for their wages in the courts of common law, in twenty-five separate actions; I do not say in an oppressive manner, for it was the only way in which they could there proceed: it is only in this Court that the mariners can combine their actions. The crew afterwards intervene in the suit carried on by Mr. Hansen in the Court of Admiralty, not exactly in the regular manner; but the Court does not expect it of such men, who are in an eminent degree *inopes consilii*. The Court would to such suitors give every relief in its power, by departing from forms, as far as is consistent with the justice due to others, especially where the Crown has intervened for the protection of the parties.

Mr. Hansen has, by his act in paying the wages schedule, waived all objection to the informality of the proceedings; and the question now is, whether the money remaining in his hands shall be answerable for the subsistence of these mariners, or whether the Crown shall be left loaded with the support of them. Mr. Hansen has in his possession, and will retain, a larger sum than will be sufficient to satisfy any demands of his own: he will, at all events, suffer no derogation [40] of his own rights, and is concerned only on behalf of his employers, the holders of these bottomry bonds. The question is, whether he, as the agent of the bondholders, has a right to retain this money as against these mariners, or against the Crown, which stands in their place. Now, it



must be taken as the universal law of this Court, that mariners' wages take precedence of bottomry bonds. These are sacred liens, and, as long as a plank remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages. This is a principle universally admitted; and whoever enters into a contract, or advances money upon bottomry, must be presumed to do it with a full knowledge of the law upon this point. But, then, is the subsistence of these men to be considered as part of their wages? I think it is so to be considered; it is wages paid in another form, it is part of the compensation for their labour; and, according to the law of the country to which these men belong, subsistence in the intermediate time must be presumed to form part of the contract for the payment of wages. The parties must be subsisted till the return to their own country, unless some special reason is shewn to the contrary, such as desertion, or any kind of misconduct, which would work a forfeiture of wages. There is, indeed, no proof of any special agreement upon this point in the present case; but it is very material that such a covenant should be presumed to subsist between the parties, especially in a case like the present, of Greek navigation. The number of Greek vessels which arrive in this country is very small; and the mariners, from the peculiarity of their language and habits, if discharged in England, could not, without extreme difficulty, find an opportunity of returning to their own [41] country. But the Court is not left solely to its own conjectures, as to what may be the established usage with respect to the subsistence or the dismissal of mariners employed in the navigation of Greek vessels. It is sworn by a person who states himself to have been for twenty years captain of an Ottoman vessel, and at present the consul-general of the Sublime Porte resident in Great Britain, that

"the captain is bound by the customary regulations of Turkey to take his men back again in his vessel, or to find them conveyance in other vessels; and that in case of sale of the vessel in this country, the proceeds thereof are liable for the support of the crew, and to procure them the means of conveyance to their own country." This, I think, effectually distinguishes the present case from the American cases which were lately before the Court. The American seamen did not there attempt to establish their right, as due to them by the universal usage and custom of their country, or as forming part of the contract under which they sailed, but upon the ground of a statute lately introduced. As the demand was made upon a mere legislative act of that country, the Court declined to interfere, but it held there, that if the subject-matter in dispute between the parties had formed

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part of the contract, it would have upheld the demand. I shall, therefore, consider the proceeds as answerable for the subsistence as well as the wages of these mariners; but I shall not meddle with the freight which is in Mr. Hansen's hands.

**MANUAL OF GENERAL PROCEDURES FOR  
DETERMINING OPERATING-DIFFERENTIAL SUBSIDY RATES**

First Revised Issue

Provisions of this Manual Approved by the Federal  
Maritime Board and Maritime Administrator on  
November 25, 1957

Issued Under Authority of Management Order No. 630

*Federal Maritime Board—U. S. Department of Commerce—  
Maritime Administration*

[49]

**PART SEVEN**

**Definitions of Subsidizable Items of Expense**

**Section 1—Wages of Officers and Crews**

Wages consist of the fair and reasonable cost of payments made by the operators directly to or for the benefit of (to the extent indicated below) members of the crew complement and relief complement of subsidized vessels for services rendered and required for the efficient and economical operation of such vessels, provided that they are not recoverable from shippers, receivers or other third parties.

Crew complement shall be construed to mean, in addition to the master, those officers and ratings approved by the Federal Maritime Board as being eligible for rate-making purposes. Relief complement shall be construed to mean those officers and ratings assigned to relieve in port members of the crew complement.



*A. Payments Eligible for Rate-Making and Subsidy Payment Purposes*

1. Base Wages.
2. Overtime, including penalty time pay.
3. Vacation pay (earned in subsidized services) including contributions to union vacation funds.
4. Penalty cargo bonuses.
5. Area bonuses.
6. Non-watch pay.
7. Tool allowances.
8. Pension, welfare and unemployment fund contributions.
9. Payroll taxes.
10. Clothing allowances, as distinguished from uniform allowances.
11. Payments to Masters and Chief Engineers for shifting ship.
12. Passenger allowances to Stewards Department on freighters.

*B. Payments Eligible for Subsidy Payment Purposes Only*

1. Travel expenses (except subsistence allowances) representing the cost of crew replacements or returning crew to port at which articles are signed.
2. Relief officers and ratings to the extent of items set forth under A above.

*C. Payments Ineligible for Rate-Making and Subsidy Payment Purposes*

1. Uniform allowances, as distinguished from clothing allowances.
2. Unclaimed wages (ineligible for subsidy payment purposes only).

[50]

3. Commissions on sale of liquors (bar bonuses).
4. Gratuities or gifts.
5. Payments (such as 50¢ per meal) and overtime to Stewards Department personnel for serving meals to other than crew and relief complement, passengers and persons necessary to the efficient and economical

operation of the vessel, i.e., pilots, immigration, customs officials, etc., actually working the vessel.

6. Payments of any kind to crew or relief complement who are represented in union collective bargaining agreements which are in excess, either in nature or amount, of that specified and required in such agreements shall not be allowed, unless specifically authorized by the Federal Maritime Board.

7. Payments of any kind to crew or relief complement who are not represented in union collective bargaining agreements which are in excess, either in nature or amount of that specified for like personnel in comparable agreements, shall not be allowed, unless specifically authorized by the Federal Maritime Board.

8. Payroll taxes (except on unclaimed wages) related to any payments disallowed under the definitions hereinabove stated.

## **Section II—Subsistence of Officers and Crews**

Subsistence consists of the fair and reasonable net costs of meals and meal allowances furnished to crew and relief complements as defined under wages of officers and crews.

The definition of the word "domestic" as used herein shall refer to the "United States" as defined in Section 505(a) of the Merchant Marine Act, 1936, as amended.

### *A. Costs Eligible for Rate-Making and Subsidy Payment Purposes*

1. Net costs of food and other edibles consumed are eligible for rate-making; however, that portion of purchases other than domestic which is included therein is ineligible for subsidy payment purposes.

2. Sales taxes.

3. Government inspection.

4. Shipside delivery costs except those incurred by crew and relief complement.



*B. Costs Eligible for Subsidy Payment Purposes Only*

1. Subsistence allowance for meals ashore when it is impracticable to serve meals aboard the vessel.
2. Subsistence allowances which are directly attributable to crew replacements or returning crew to port at which articles were signed.
3. Loading costs (domestic) when loading is performed by other than crew and relief complement.

[51]

*C. Costs Ineligible for Rate-Making and Subsidy Payment Purposes*

1. Room or lodging allowances.
2. Subsistence allowances as indicated in B-1 and B-2 above, which are in excess of amounts stipulated in collective bargaining agreements.
3. Bar and slop chest supplies, fuel and water.
4. Storeroom handling charges.
5. Purchases, other than domestic (ineligible for subsidy payment purposes only).
6. Loading costs (other than domestic) when loading is performed by other than crew and relief complement.

**Section III—Hull and Machinery Insurance**

The fair and reasonable costs of Hull and Machinery, Increased Value, Excess General Average, Salvage and Collision Liability insurance, excluding war risk insurance, against risks and liabilities covered under the terms and conditions of policies approved as to form and coverage by the Maritime Administration, shall be eligible for subsidy at the applicable Hull and Machinery Insurance subsidy rate.

Approval as to form and coverage of such insurance shall be determined by the Office of the Comptroller in accordance with the definition set forth above and subject



to such limitations as may be prescribed by the Federal Maritime Board/Maritime Administrator.

*A. Costs Eligible for Rate-Making and Subsidy Payment Purposes*

1. Net premium costs after brokerage and owners' adjustments.
2. Foreign stamp taxes.

*B. Costs Ineligible for Rate-Making and Subsidy Payment Purposes*

1. War risk insurance premiums and related costs.
2. Shore risk premiums.
3. Premiums on insurance of premiums.

**Section IV—Protection and Indemnity Insurance Premiums**

The fair and reasonable costs of Protection and Indemnity and Second Seamen's insurance, excluding war risk insurance, against liabilities covered under the terms and conditions of policies approved as to form and coverage by the Maritime Administration shall be eligible for subsidy at the applicable Protection and Indemnity insurance premium subsidy rate.

Approval as to form and coverage of such insurance shall be determined by the Office of the Comptroller in accordance with the definition set forth above and subject to such limitations as may be prescribed by the Federal Maritime Board/Maritime Administrator.

## EXCERPTS FROM VESSELS' EXHIBIT 2

### *MMP-PMA Vacation Plan Agreement*

\* \* \*

MM&P, through collective bargaining negotiations, has reached agreement with PMA, which provides in general terms for establishment of a pooled vacation plan for the benefit of Licensed Deck Officers employed in work covered by said agreement.

\* \* \*

#### X. Liability for Contributions

Neither PMA nor any Contributing Employer shall be liable to MM&P or to the Trustees or to anyone else for contributions due from any other Contributing Employer, except that PMA shall be obliged to transmit to the Trustees any contributions received by it, and to take all reasonable steps necessary in the endeavor to compel its members who are Contributing Employers to comply with the obligations hereunder.

\* \* \*

### *MM&P-PMA Vacation Plan—Declaration of Trust*

The undersigned [trustees] . . . do hereby declare this to be an irrevocable trust, subject to all the terms and provisions of said Vacation Plan Agreement, for the sole and exclusive benefit of eligible Licensed Deck Officers. . . .

\* \* \*

### *MMP-PMA Pension Agreement*

\* \* \*

#### Article X. Liability for Contributions.

Neither the Association nor any Contributing Employer shall be liable to any licensed deck officer or to the Trustees

or to anyone else for contributions due from any other Contributing Employer, except that the Association shall be obliged to transmit to the Trustees any contributions received by it.

### Article XI. Rights in Fund

. . . The Pension Fund shall constitute an irrevocable trust having the sole and exclusive obligation and purpose of providing pensions to licensed deck officers within the unit; no portion of any contribution paid into the trust may revert to any employer, and all contributions shall be used solely to provide such pensions.

\* \* \*

### *MMP-PMA Pension Plan—Declaration of Trust*

\* \* \*

### Article II. Trust Fund

Section 1. There is hereby created the MMP-PMA Pension Trust, an irrevocable trust, for the sole and exclusive benefit of covered employees. . . . No part of this trust shall be used for or diverted to purposes other than to provide pensions for the exclusive benefit of covered employees and their beneficiaries, by amendment or otherwise.

\* \* \*

### *MMP-PMA Welfare Plan Agreement*

\* \* \*

### § 2. Contributions.

On and after January 1, 1950, the following contributions shall be paid to . . . the MMP-PMA Welfare Fund . . . by Employers in respect of work performed under the said agreement of December 9, 1949, for the sole purpose of providing for the payment of life, sick, accident or other benefits to members or their dependents within the mean-



ing of these terms as used in Section 501(c) of the Internal Revenue Code of 1954, and to meet expenses of the Fund: . . .

\* \* \*

#### § 9. Collection of Unpaid Contributions.

\* \* \*

(b) Neither the Association nor any member of the Association nor any Contributing Employer shall be liable to the Union or to the Trustees or to the Fund or to anyone else for contributions or any other payments due from any other Employer or Contributing Employer, except that the Association shall be obliged to transmit to the Trustees any contributions received by it, and to take all reasonable steps necessary in the endeavor to compel its members who are Contributing Employers to comply with the obligations hereunder.

\* \* \*

#### *MEBA-PMA Vacation Plan Agreement*

\* \* \*

MEBA, through collective bargaining negotiations, has reached agreement with PMA, which provides in general terms for establishment of a pooled vacation plan for the benefit of Licensed Engineers employed in work covered by said Agreement.

\* \* \*

#### X. Liability for Contributions

Neither PMA nor any Contributing Employer shall be liable to MEBA or to the Trustees or to anyone else for contributions due from any other Contributing Employer, except that PMA shall be obliged to transmit to the Trustees any contributions received by it, and to take all reasonable steps necessary in the endeavor to compel its members

who are Contributing Employers to comply with the obligations hereunder.

\* \* \*

### *MEBA-PMA Vacation Plan—Declaration of Trust*

The undersigned [trustees] . . . do hereby declare this to be an irrevocable trust, subject to all the terms and provisions of said Vacation Plan Agreement, for the sole and exclusive benefit of eligible licensed engineers. . . .

\* \* \*

### *MEBA-PMA Pension Agreement*

\* \* \*

## Article X. Liability for Contributions

Neither the Association nor any Contributing Employer shall be liable to any licensed engineer or to the Trustees or to anyone else for contributions due from any other Contributing Employer, except that the Association shall be obliged to transmit to the Trustees any contributions received by it.

## Article XI. Rights in Fund

. . . The Pension Fund shall constitute an irrevocable trust having the sole and exclusive obligation and purpose of providing pensions to licensed engineers within the unit. . . .

\* \* \*

### *MEBA-PMA Pension Plan—Declaration of Trust*

## Article II. Trust Fund

Section 1. There is hereby created the MEBA-PMA Pension Trust, an irrevocable trust, for the sole and exclusive benefit of covered employes. The trust may provide benefits through contracts with or policies issued by a licensed insurance carrier or may otherwise fund and pay pensions. Said Fund shall consist of all payments required to be made into this Trust and all interest, income and other

returns thereon of any kind whatsoever. No part of this trust shall be used for or diverted to purposes other than to provide pensions for the exclusive benefit of covered employes and their beneficiaries, by amendment or otherwise.

\* \* \*

### *MEBA-PMA Welfare Plan Agreement*

\* \* \*

2. *Contributions.* On and after January 1, 1950, the following contributions shall be paid to . . . the MEBA-PMA Welfare Fund . . . for the sole purpose of providing for the payment of life, sick, accident or other benefits to members or their dependents within the meaning of these terms as used in Section 501(c) of the Internal Revenue Code of 1954, and to meet expenses of the Fund.

\* \* \*

(a) . . . (1) . . . The term "welfare contributions" . . . means amounts collected from members and amounts contributed to their welfare plan by the employers of members for the sole purpose of providing for the payment of life, sick, accident or other benefits to members or their dependents.

\* \* \*

### *ARA-PMA Vacation Plan Agreement*

\* \* \*

ARA, through collective bargaining negotiations, has reached agreement with PMA, which provides in general terms for establishment of a pooled vacation plan for the benefit of Radio Officers employed in work covered by said Agreement.

\* \* \*

## **X. Liability for Contributions**

Neither PMA nor any Contributing Employer shall be liable to ARA or to the Trustees or to anyone else for con-



tributions due from any other Contributing Employer, except that PMA shall be obliged to transmit to the Trustees any contributions received by it, and to take all reasonable steps necessary in the endeavor to compel its members who are Contributing Employers to comply with the obligations hereunder.

\* \* \*

#### *ARA-PMA Vacation Plan—Declaration of Trust*

The undersigned [trustees] . . . do hereby declare this to be an irrevocable trust, subject to all the terms and provisions of said Vacation Plan Agreement, for the sole and exclusive benefit of eligible radio officers. . . .

\* \* \*

#### *ARA-PMA Pension Agreement*

*Whereas*, the parties have agreed to establish a pension plan in accordance with applicable federal and state legislation to provide pension benefits to retired Licensed Radio Officers.

\* \* \*

#### Article IX. Liability for Contributions

All the contributions hereunder received by the Association shall be received and held in trust. Neither the Association nor any Contributing Employer shall be liable to any Licensed Radio Officer or to the Trustees or to anyone else for contributions due from any other Contributing Employer, except that the Association shall be responsible for, and obliged to transmit to the Trustees any contributions received by it.

\* \* \*

*ARA-PMA Pension Plan—Declaration of Trust.*

\* \* \*

## Article II. Trust Fund

Section 1. There is hereby created the ARA-PMA Pension Trust, an irrevocable trust, for the sole and exclusive benefit of covered employees. . . . No part of this trust shall be used for or diverted to purposes other than to provide pensions for the exclusive benefit of covered employees and their beneficiaries, by amendment or otherwise.

\* \* \*

## Article IX

\* \* \*

(b) It is understood and agreed that no part of the trust corpus or income may be used for or diverted to purposes other than for the exclusive benefit of Licensed Radio Officers who are Covered Employees, either by operation or natural termination of this trust, by any power of revocation or amendment, by the happening of any contingency, by collateral arrangement, or by any other means.

\* \* \*

*ARA-PMA Welfare Plan Revised Agreement*

\* \* \*

2. *Contributions.* On and after January 1, 1950 contributions shall be paid to . . . the ARA-PMA Welfare Fund . . . for the sole purpose of providing for the payment of life, sick, accident or other benefits to members or their dependents within the meaning of these terms as used in Section 501(c) of the Internal Revenue Code of 1954, and to meet expenses of the Fund—by Employers in respect of work performed under the said basic Agreement, as follows:

\* \* \*

... The term "welfare contributions" ... means amounts contributed to the welfare plan by the employers of members for the sole purpose of providing for the payment of life, sick, accident or other benefits to members or their dependents, ...

*ARA-PMA Welfare Plan Revised Declaration of Trust*

Whereas, the ARA-PMA Welfare Plan Agreement provides for payments to be made by the employers to Trustees to be held in trust for the purpose of establishing and maintaining a welfare Trust Fund to provide welfare benefits for employes specified therein and their families and dependents, and said agreement further provides that the Fund shall be jointly administered by Trustees designated by the Union and by the Association so that employers and ...

\* \* \*

*SIU-PD-PMA Pension Plan Agreement*

\* \* \*

**X. Liability for Contributions**

Neither the Association nor any Contributing Employer shall be liable to any seaman or to the Trustees or to anyone else for contributions due from any other Contributing Employer, except that the Association shall be obliged to transmit to the Trustees any contributions received by it.

**XI. Rights in Fund**

... The Pension Fund shall constitute an irrevocable trust having the sole and exclusive obligation and purpose of providing pensions to seamen as defined in this agreement; no portion of any contribution paid into the trust may revert to any employer, and all contributions shall be used solely to provide such pensions.



\* \* \*

*SIU Pacific District-PMA Pension Plan—  
Declaration of Trust*

The undersigned [trustees] . . . do hereby declare this to be an irrevocable trust, subject to all the terms and provisions of said pension plan agreement, for the sole and exclusive benefit of eligible seamen. . . .

\* \* \*

9. Termination.

\* \* \*

(b) It is understood and agreed that no part of the trust corpus or income may be used for or diverted to purposes other than for the exclusive benefit of seamen who are covered employees, either by operation or natural termination of this trust, by any power of revocation or amendment, by the happening of any contingency, by collateral arrangement, or by any other means.

\* \* \*

*MSO-PMA Welfare Plan Agreement*

\* \* \*

§2. Contributions.

. . . [T]he following contributions shall be paid to . . . the MSO-PMA Welfare Fund . . . by Employers for the sole purpose of providing for the payment of life, sick, accident or other benefits to members or their dependents within the meaning of these terms as used in Section 501(c) of the Internal Revenue Code of 1954, and to meet expenses of the Fund.

\* \* \*

§ 9. Collection of unpaid contributions.

\* \* \*

(b) Neither the Association nor any member of the Association nor any Contributing Employer shall be liable to the Union or to the Trustees or to the Fund or to anyone else for contributions or any other payments due from any other Employer or Contributing Employer, except that the Association shall be obligated to transmit to the Trustees any contributions received by it, and to take all reasonable steps necessary in the endeavor to compel its members who are Contributing Employers to comply with the obligations hereunder.

\* \* \*

*SUP-PMA Welfare Plan Agreement*

\* \* \*

V. Benefits

All assets . . . shall be held by it . . . in trust to provide such health or welfare benefits as the Trustees may from time to time determine. . . .

\* \* \*

XI. Liability for Contributions

...Neither PMA nor any Contributing Employer shall be liable to SUP or to the Trustee or to anyone else for contributions due from any other Contributing Employer, except that PMA shall be obliged to transmit to the Trustee any contributions received by it.

\* \* \*

*MFW-PMA Welfare Plan Agreement*

\* \* \*

§ 3. Contributions.

\* \* \*

(c) The contributions specified in (a) and (b) above . . . are to be utilized for the sole purpose of providing for the

payment of life, sick, accident, or other benefits to employees covered by the plan or their dependents. . . .

\* \* \*

#### § 9. Collection of Unpaid Contributions.

\* \* \*

... (b) Neither the Association nor any member of the Association nor any Contributing Employer shall be liable to the Union or to the Trustees or the Fund or to anyone else for contributions or any other payments due from any other Employer or Contributing Employer, except that the Association shall be obliged to transmit to the Trustees any contributions received by it, and to take all reasonable steps necessary in the endeavor to compel its members who are Contributing Employers to comply with the obligations hereunder.

\* \* \*

#### *MCS-AFL-PMA Welfare Plan Agreement*

\* \* \*

*Whereas*, the Union and the Association and the employers desire to amend the existing Welfare Plan and to maintain a lawful jointly administered Welfare Plan for the stewards department employees within the collective bargaining unit.

\* \* \*

#### X. Liability for Contributions

Neither the Association nor any member of the Association nor any Contributing Employer shall be liable to the Union or to the Trustee or the Fund or to anyone else for contributions or any other payments due from any other Employer or Contributing Employer, except that the Association shall be obliged to transmit to the Trustee any contributions received by it, and to take all reasonable steps



necessary in the endeavor to compel its members who are Contributing Employers to comply with the obligations hereunder.

\* \* \*

*SIU Pacific District-PMA Supplemental Benefits  
Agreement*

\* \* \*

The parties recognize and agree that eligible seamen work for many different employers over a period of time. The parties have, therefore, agreed to establish a Supplemental Benefits Fund which will make available to eligible seamen payments in lieu of vacation.

\* \* \*

III. Contributions to Supplemental Benefits Fund

\* \* \*

(b) . . . If a Contributing Employer is delinquent or defaults in payment of contributions, the lien against the ship for seamen's wages shall be available to the Trustee. . . .

(c) It is intended that the contributions shall be based on the amount necessary to operate the plan properly and to provide the payments agreed upon without the establishment of any reserve except that reasonably necessary for obligated or prospective payments and liabilities, contingent or otherwise. . . .

\* \* \*

X. Liability for Contributions

Neither the Association nor any Contributing Employer shall be liable to the Union or to the Trustee or to anyone else for contributions due from any other Contributing Employer, except that the Association shall be obligated to transmit to the Trustee any contributions received by it, and to take all reasonable steps necessary in the endeavor to compel its members who are Contributing Employers to comply with the obligations hereunder.

\* \* \*

In the  
**United States Court of Appeals**  
*for the Ninth Circuit*

JOHN A. CROSS, et al.,

*Appellants,*

vs.

S.S. KAIMANA, her engines, et al.,

*Appellees.*

No. 21719

JOHN A. CROSS, et al.,

*Appellants,*

vs.

S.S. LANAKILA, her engines, etc., et al.,

*Appellees.*

No. 21719A

JOHN A. CROSS, et al.,

*Appellants,*

vs.

S.S. ALASKA BEAR, her engines, etc., et al.,

*Appellees.*

No. 21719B

JOHN A. CROSS, et al.,

*Appellants,*

vs.

S.S. PACIFIC BEAR, her engines, etc., et al.,

*Appellees.*

No. 21719C

JOHN A. CROSS, et al.,

*Appellants,*

vs.

S.S. COAST PROGRESS, her engines, etc., et al.,

*Appellees.*

No. 21719D

**Brief of Appellee Pacific Far East Line, Inc.**

**FILED**

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No. 21719, 21719A, 21719B, 21719C, 21719D

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JOHN A. CROSS, et al.,

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JOHN A. CROSS, et al.,

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vs.

No. 21719C

S.S. PACIFIC BEAR, her engines, etc., et al.,

*Appellees.*

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JOHN A. CROSS, et al.,

*Appellants,*

vs.

No. 21719D

S.S. COAST PROGRESS, her engines, etc., et al.,

*Appellees.*

---

**Brief of Appellee Pacific Far East Line, Inc.**

## INTRODUCTION

By stipulation (Clerk's Transcript, page 274, lines 5 to 11, hereinafter "CT 274 5:11") the sole issue involved is:

"... whether the Trustees of 15 Vacation, Pension and Welfare funds established by collective bargaining between ship operators and the unions representing seamen are entitled to, or are entitled to the benefits of or to enforce, seamen's maritime wage liens upon the five libeled vessels for certain amounts which former operators of the vessels agreed to pay but failed to pay to the Trustees. If and to the extent this is so, recovery should be granted; if and to the extent it is not so, recovery should be denied."

This Brief is divided into the following sections: *First*: A statement of certain facts not included in Appellants' Statement of the Case. *Second*: A discussion of various collateral complications which Appellants' position would lead to if adopted. *Third*: A discussion of the reasons why that position is unsupportable in its own right. Failure to include a section directed to Appellants' Statement of the Case is prompted solely by considerations of a brevity and does not denote agreement with all assertions therein. The salient facts are in any event reduced to stipulation (CT 273 through 291) in a form specifically designed and intended to serve as a self-contained and cohesive narrative thereof.

### I.

#### FACTS OMITTED FROM APPELLANTS' STATEMENT OF THE CASE

1. **The trust funds are used for other purposes besides the payment of benefits to seamen and derive from other sources besides Employer Contributions.**

Appellants' characterization of the trusts as mere "conduits" through which seamen receive vacation pay, pensions



and welfare benefits (Ap. Br. 13 and elsewhere) is not properly descriptive. For instance, it is not true that every disbursement from the trust corpus goes to a seaman. In addition to the payment of benefits to seamen, trust funds are expended for many other uses, far removed from anything that could possibly be associated with a maritime lien. Thus, (Vessel Exhibit F 4:1 to 6:12; Vessel's Exhibit G 3:27 to 4:6 and 5:1-11; CT 288:24 to 289:10) benefits are also paid to *shoreside* workers, including (depending upon the particular trust involved) Union officials, clerks and staff personnel engaged in administering the trusts, instructors and staff of shoreside recreational facilities, shore-based workmen employed to repair and maintain empty cargo vans, and personnel assigned to indefinite or permanent shoreside duties. Furthermore, the expenses of administering the trusts, including staff salaries, space rental, office equipment, legal expenses, traveling expenses, insurance, accounting and actuarial services, investment expenses, etc. are all paid out of the corpus of the trust (Vessel's Exhibit F 6:13-21). In short, many of those who received benefits work ashore, and substantial portions of the trust funds are disbursed for other than benefits to *any* worker.<sup>1</sup>

Nor should it be thought that the benefits paid seamen derive exclusively or directly from Employer Contributions of the kind here sought to be recovered. The contributions are invested and a substantial part of the trusts' income derives from earnings on their extensive security holdings

---

1. The amount donated *each year* by the SUP Welfare Trust to the support of the Andrew Furuseth School for Seamanship exceeds the total combined delinquencies of Coastwise Line and Dorama sought to be recovered herein by this trust (Reporter's Transcript 107; CT 278:20).

(Reporter's Transcript, hereinafter "RT" 102:8-10).<sup>2</sup> In the case of some of the trusts the employees themselves also contribute sums (CT 277:20-25).

Thus, it is proper to describe the trust as a "conduit" between Coastwise/Dorama and the seamen employed on their vessels only if it is proper to speak of the Crystal Springs Reservoir—augmented as it is by local streams and rains and drawn on as it is for many uses—as a "conduit" between Hetch-Hetchy Dam and a particular householder's kitchen sink.

**2. Receipt by the seamen of the benefits to which they are entitled is not dependent upon payment of the contributions due from any particular employer; each seaman receives his benefits whether his employer makes the payments due or not.**

It is conceded (Ap. Br. 14) that all seamen who worked on the five libeled vessels had been paid all benefits claimed "prior to trial" and that no beneficiary of any trust had been denied a benefit "prior to trial" because of the Coastwise/Dorama delinquency. Here, again, this is by no means the whole story. The fact is that neither the seamen employed on the Coastwise/Dorama vessels concerned nor any other seamen on any other vessel, past or future, will ever for that reason receive less than the full benefits to which he is entitled. One of the facts stipulated (CT 284:11-16) is that:

"The operation of each benefit plan is reviewed annually and if considered necessary or advisable, the size

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2. An audited financial statement of the MM&P Pension Fund for the year 1962, admitted as vessel's Exhibit A, was characterized by witness St. Sure as a "typical" statement, (RT 103:3-5), though the "earnings from the invested securities will vary because of different philosophies that have been developed by the various unions and the trustees involved." (RT 102:16-19). For the court's enlightenment the list of securities then current is reproduced as Appendix A hereto.



of Employer Contributions is adjusted in the light of such review and of actuarial estimates as to future demands on the funds so as to enable the Trustees to continue to meet the required benefit payments.”

More specifically, it is admitted (depending upon the particular trust involved) that PMA and its members guarantee the benefits,<sup>3</sup> that the employers would “necessarily have to absorb the amount of the delinquent contributions [owing by Coastwise and Dorama] if collection efforts proved unsuccessful,”<sup>4</sup> that the contribution rates are commonly increased *retroactively*, based on actuarial reports and new benefit schedules agreed to,<sup>5</sup> that the employers are committed to “a program of providing a fixed benefit rather than a contribution,”<sup>6</sup> that “the PMA members in effect guarantee payment of contributions for employment with all PMA members on a pooled basis so that if one member is delinquent the other members would have to make up the deficiency,”<sup>7</sup> and that employees are credited with the full number of days of covered employment whether or not their employer has paid the necessary contributions to the trust.<sup>8</sup> Counsel referred during the trial to “the fact that the benefits are guaranteed by the Pacific Maritime Association” (RT 31:2-3) and stated that “the maintenance of the trust funds is guaranteed” and that “PMA is a guarantor” (RT 31:19-21). Mr. St. Sure, Chairman of the Board of PMA, confirmed that “the amount of contributions vary depend-

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3. Vessel’s Exhibit G, Para. 2(a) (b) and (c).

4. Vessel’s Exhibit G, Para. 6 and 11.

5. Vessel’s Exhibit G, Para. 5, 12, 13, 15.

6. Vessel’s Exhibit G, Para. 16 and 19; also 21.

7. Vessel’s Exhibit G, Para. 17.

8. Vessel’s Exhibit G, Para. 22.



ing upon the actuarial experience of the funds" (RT 102:10-12). Finally, it is stipulated (CT 290:27-30) that:

"So far as is now known or can reasonably be anticipated, the quantum of benefits to be received in the future by each seagoing beneficiary of the Trusts will be the same, whether or not any recovery is effected by the Trust in any of the five consolidated actions."

**3. In addition to Employer Contributions, four of the trusts make provision for Employee Contributions as well.**

In the case of the MEBA, SUP, MFOW and MCS Welfare Trusts, provision is made for an optional direct contribution by the seamen themselves, in addition to Employer Contributions of the type here sought to be recovered (Vessel's Exhibit F 8:1-6). Where such is desired an "Enrollment Card" (samples are appended to Vessel's Exhibit F, pages 8 through 11) must be signed by the individual seaman authorizing his employer to deduct 1% of his "wages"<sup>9</sup> and pay such amount into the trust fund. The importance of the fact that the personal signature of the individual is required for the employee contribution but not for the employer contribution, is made clear hereinafter, p. 13.

**4. The governing documents preclude the attribution of "wage" status to the Employer Contributions.**

Each of the fifteen trusts was created by a Trust Agreement executed by PMA and the Union in question. In all but one or two instances, there is also a Declaration of Trust, executed by the trustees. These agreements and declarations are the documents which prescribe and describe the duties and rights of those concerned. They are collected and in evidence as Vessel's Exhibit 2, the location therein

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9. "Wages" as here used does *not* include any part of the Employer Contribution which the trusts contend is secured by the seaman's "wage" lien. Vessel's Exhibit F 12:8-12.

of the documents pertaining to each particular trust being identified by a marginal name tab. Vessel's Exhibit 2 is formidable in bulk (it is three inches thick and includes 68 separate documents) but, fortunately for those having the responsibility of informing the court of pertinent material therein, the agreements and declarations to a large extent follow the same or similar formats and have parallel or counterpart language so that statements having general application can be made about them.

The notion that payment of the Employer Contributions is secured by a "wage" lien is antithetical to various provisions in these governing documents. Thus:

(a) In the case of eleven of the fifteen trusts the documents explicitly state that:

"[Employer] contributions to be paid into the fund shall not constitute or be deemed wages due to [employee]."

(b) In the case of each of the trusts the amount of Employer Contributions payable is a *function* of the number of days the seaman is paid "wages."<sup>10</sup>

(c) All of the trusts provide that the individual workmen (beneficiaries) have no right to Employer Contributions and no interest in the corpus of the trust. More specifically, in all cases the creating documents provide in words identical or identical in effect that:

"No [employee] . . . shall have any right, title, interest or claim in or to his employer's or any other contributory employer's payments or contributions to the fund."

and/or that:

"No [employer] shall have any right to receive any part of the contributions instead of [or in lieu of] benefits."

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10. As an example, Section 1(c) of the MMP Welfare Plan provides: "An employee shall be regarded as having 'employment' with respect to which a contribution is due on any day for which he is entitled to be paid wages."



So far as an interest in the corpus itself is concerned, in eight of the trusts the creating documents provide that no employee:

“shall have any vested rights in or to the Fund or any part thereof, and upon the termination of the trust hereby created, the fund shall be put to the uses and purposes specified herein.”

and in six it is provided that:

“Neither PMA, nor any union, nor any employer, nor any employee, nor any beneficiary under the Plan shall have any right, title or interest or any of the monies or property of the [trust].”

A key to the location of the foregoing provisions in Vessel’s Exhibit 2 is included as Appendix B to this Brief.

(d) Frequently there is not the direct relationship between the amount of the Employer Contribution and the productivity or job rating of the employee involved characteristic of “wages”. Thus, in the case of the MMP Pension and Welfare Plans, eligibility for benefits is *lost* if the employee ceases to be a member of the Union labor pool (Article IV, pp. 13 and 14, “First Amended MMP-PMA Pension Agreement” and § 6 (b) (d) of “First Amended MMP-PMA Welfare Plan Agreement” in Vessel’s Exhibit 2). In the case of each of the trusts, the right to any benefits is *dependent on a minimum number of days* of work having been performed during a specified period (CT 288:11-14). In the case of the Vacation trusts of the licensed officers, a change in employers can effect the right to benefits *retroactively*, i.e., the benefits are higher if the employee serves a specified minimum time with the same employer (§ IV(b) of the MEBA, MMP, and ARA Vacation Plans, Vessel’s Exhibit 2).

Yet in each instance the obligation to pay Employer Contributions remains constant.



## II.

**COLLATERAL CONSEQUENCES OF A HOLDING THAT A CLAIM FOR DELINQUENT EMPLOYER CONTRIBUTIONS IS ENFORCEABLE BY A MARITIME LIEN**

1. **Such a result would contravene the purposes of the Ship Mortgage Act of 1920, and do so by violating the rule forbidding extension of secret liens.**

Prior to 1920 ship mortgages were not justiciable in Admiralty, and were thus outranked by all maritime liens and unattractive as security. In that year Congress, motivated by the objective of encouraging American investment in shipbuilding,<sup>11</sup> passed the Ship Mortgage Act. Among other factors necessarily considered was the rank which the preferred mortgage should enjoy in the hierarchy of maritime liens. It was determined (46 USC 593 (a)) that the only liens which should outrank a preferred ship mortgage were liens pre-dating the mortgage and liens "for damages arising out of torts, for wages of a stevedore when employed directly by the owner . . ., for *wages of the crew of the vessel*, for general average, and for salvage . . ." (Emphasis added.) Fairly stated, the issue in this case is whether Congress' intention will be subserved by permitting delinquent Employer Contributions to outrank valid preferred ship mortgages when the fact is (*supra*, p. 4, 5), that no seamen will suffer in the slightest if the delinquency is not recovered.

Holders of preferred ship mortgages are not the only class concerned with the security value of vessels. Repairmen, suppliers, towers and many others rely heavily on the

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11. "The purpose of the Ship Mortgage Act 1920 . . . was to make ships' mortgages desirable investments . . ." *Atlantic Steamer Supply Co. v. SS TRADEWIND*, 153 F. Supp. 354, 358. See *Gilmore and Black, The Law of Admiralty* § 9-48; *Merchants & Marine Bank v. The T. E. WELLES*, 289 F. 2d 188, 193, 194; *Detroit Trust Co. v. BARLUM*, 293 U.S. 21, 39.

credit of the vessel available to them through the remedy of a proceeding *in rem*. Buyers of vessels also are concerned with the possible existence of undisclosed and unknown liens. Because of this it has repeatedly been recognized that:

“The maritime lien is a secret one. It may operate to the prejudice of prior mortgages or of purchasers without notice. It is therefore *stricti juris* and will not be extended by construction, analogy or inference.” (*Piedmont Coal Co. v. Seaboard Fisheries Co.*, 254 U. S. 1, 12.)

See also *The Yankee Blade*, 19 How. 82, 89; *Osaka Shosen Kaisha v. Lumber Co.*, 260 U.S. 490, 499; *Plamals v. Pinar Del Rio*, 277 U.S. 151, 156; *The Saturnus*, 250 F. 407, 414; *Benedict on Admiralty*, § 15.

This is *precisely* what the trusts are here attempting to do, viz., to “extend” the lien given for a seaman’s wage to make it applicable to Employer Contributions by “*analogizing*” the latter with the former, despite the obvious differences between the two (*infra* pp. 17-19).

The situation before this court presents a good illustration of the wisdom of the principle stated in the above quotation and the mischief it is designed to counteract. Where cash wages are concerned, a mortgagee need have little concern that any threat to his security will develop from this direction beyond the amount that might accrue during one voyage. If the seamen are not paid everything to which they are entitled at voyage-end it is most unlikely the vessel would not be seized and the mortgagee thereby notified of the situation before the wage priority has a chance to compound. In the case of Employer Contributions, on the other hand, the trusts are under no compulsion to insist on timely payment; indeed, the longer the vessel can meet its payroll and keep operating, the more employ-



ment is afforded their beneficiaries. It is stipulated (CT 286: 19-32) that Coastwise Line first failed to timely meet a monthly contribution about a *year and a half* before it ceased operations, by which latter time it had fallen behind so far that the last payment made, in January, 1960, was allocable to the previous February. Dorama made no contributions whatsoever during its period of operation, except to the three MMP trusts (CT 287:1-7). The result was that by the time the operations of these companies terminated the delinquencies which the trusts are now attempting to recover from the preferred mortgagees had grown to substantial proportions.

The foregoing illustrates a point of general application, viz. if the seaman's wage lien were to be extended to include Employer Contributions, investors who rely on the security afforded by the Ship Mortgage Act, as well as materialmen, suppliers, buyers and others, would incur substantial risks of priority debts accumulating over periods of time unbeknownst to them.<sup>12</sup> *At the very least*, any program designed to effect such an extension of the statutory "preferred maritime lien" should be acted upon by Congress. Congress alone should decide whether one of its creatures (the "preferred maritime lien") is to be expanded and another (the "preferred ship mortgage") *pro-tanto* devalued.<sup>13</sup> It is difficult to think of a more typical call for legislative rather than judicial deliberation—or a more manifest example of the

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12. The fact that a particular mortgagee may know that such trusts exist, does not affect the principle. As a general proposition, lenders will *not* know whether the contributions are being paid to the trusts when due or are being permitted to build up. The necessity of policing the mortgagor's monthly commitments (or the attendant risk of not doing so) would substantially reduce the attraction of a preferred ship mortgage as a security device.

13. See last sentence of majority opinion in *U.S. v. Embassy Restaurant*, 359 U.S. 29, 35 (discussed *infra* pp. 25, 26): "If this class [i.e. "wages"] is to be so enlarged, it must be done by Congress."



wisdom of the rule that the courts will not extend maritime lien status, secret and potent as it is, by “construction, analogy or implication.”

**2. If Employee Contributions are "Seaman's Wages," their collection by appellants is illegal under 46 USC 599(g).**

For there to exist a lien for “wages of the crew of the vessel” the item secured must perforce be a “wage.” Whenever a crewmember’s “wage” is paid to anyone other than himself, it is necessary to examine 46 USC 599—the so-called “Allotment” statute—sub-division (d) of which makes it *unlawful* for another to receive a seaman’s wages except as therein provided.

Subsection (g) (added in 1950) is the only relevant portion and it provides in pertinent part as follows:

“The provisions of this section shall not apply to, or render unlawful, deductions made by an employer from the wages of a seaman, pursuant to the written consent of the seaman, if (1) such deductions are paid into a trust fund established for the sole and exclusive benefit of seamen . . . (2) such payments are held in trust for the purpose of providing . . . medical and/or hospital care, pensions . . . life insurance, unemployment benefits, compensation for illness or injuries resulting from occupational activity, sickness, accident and disability compensation, or any one or more of the foregoing benefits . . .”

Two features of this statute have critical importance to the instant suits.

(a) The first is that to be lawful the deduction must be “pursuant to the written consent of the seaman.” It is conceded (Vessel’s Exhibit F 12:2-7) that in the case of none of the fifteen trusts is any written consent given by a seaman to the payment of Employer’s Contributions to the

trust. By contrast, in the case of the four trusts in which provision is made for Employee Contributions, the signature of each seaman authorizing the deduction and payment to the trust is required (*supra* p. 6).

The failure of the trusts to obtain the seaman's written consent to paying Employer Contributions to the trusts is consistent only with a recognition by all concerned that Employer Contributions—as distinguished from Employee Contributions—are not “wages.”<sup>14</sup> If they *are* “wages,” then it is illegal for the trusts to recover them in view of the absence of “written consent of the seaman” and the instant suits must fail on this ground. (No authority is known for the proposition that a debt which it is illegal to collect in an *in personam* proceeding can be collected in an *in rem* proceeding.)

(b) The second feature of importance in connection with sub-division (g) is the omission of any reference to *vacation* trusts. Only pension and welfare plans are listed as sanctioned objects of allotment. If the Employer Contributions here sought to be recovered are treated as “wages,” then the claims for amounts due the vacations trusts are unenforceable as unpermitted allotments under 46 USC § 599.

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14. This was the holding in *Denton* (cited and discussed *infra*), where the Court noted that, “No effort was made to provide for deductions from the wages of a seaman pursuant to his written consent as is permitted by 46 USC § 599 (g)” (302 F. 2d 404, 415). It also accords with the position set forth in the letter from Executive Secretary of the C.I.O. Maritime Committee to the House Merchant Marine and Fisheries Committee (Vessel's Exhibit C, page 19) opposing the addition of sub-section (g) to Section 599 because of the objection to any further extension of the categories of permitted deductions from a seaman's “wages.” In advancing this contention the establishment of pension and welfare funds “based on employers' contributions only” was described as a “sound principle which should be retained.” To the writer of this letter, the addition of sub-section (g) was unnecessary to validate employer contributions *because they are not “wages.”* For the Court's ready convenience, this letter is reproduced as Appendix C to this Brief.



**3. Recovery of Employer Contributions related to masters would violate the rule that a master's wages are not enforceable by a wage lien.**

Under American law, a master has no lien for his wages. *Benedict on Admiralty*, § 80; *Gilmore and Black, The Law of Admiralty*, p. 512; *Robinson on Admiralty*, p. 369. A substantial portion of the delinquencies here sought are allocable to the employment of masters, to whom the libelled vessels would not be liable *in rem* even in a direct action brought by the individual involved for conventional wages.

**4. A serious threshold question of jurisdiction is involved.**

“A contract to work on the ship is of course maritime . . . but not a contract to procure someone so to work.” *Goumas v. Karras*, 51 F. Supp. 145, affirmed, 140 F.2d 157.

The *Karras* case was a libel *in rem* by a ship chandler who had been employed to supply seamen for service on a vessel which the operator was alleged to have known was verminous. After sighting her condition, the men refused to work aboard her. The recovery sought was the cost of transporting the men to the ship and for their lodging, etc. until libelant could find them other employment. The court dismissed the libel for lack of jurisdiction, stating:

“Here the contract was clearly a land contract to furnish seamen. *The maritime contract . . . was that made by the seamen for work upon the ship.*” (Emphasis added.)

In *The Josephine & Mary*, 120 F.2d 459, an injured seaman alleged breach of an agreement by the vessel owner to pay all hospital and medical expenses plus a share of the “catch” of the season’s fishing. The Commissioner found, and the District Court and the Court of Appeals agreed, that the contract



“... is not a maritime contract or a contract for the performance of which there was a lien on the vessel.”

A recent decision on the point is *Marchessini v. Pacific Marine*, 227 F. Supp. 17, 1964 A.M.C. 1538, reviewing the decisions and holding an agreement to husband vessels, solicit cargo and collect freight to be a non-maritime contract because it did not include the navigation or management of any vessel.

The contracts here sued upon are the Trust Agreements admitted as Vessel's Exhibit 2. These documents are signed by the Pacific Maritime Association on behalf of its members (or, in the case of Dorama, by Dorama, itself) on the one hand, and by the particular Union, on the other. They are not signed by any crew member. They do not obligate any particular seaman to work aboard any particular vessel, or, indeed, to do anything. Nor do they relate to the navigation or employment of any vessel. There is at least serious doubt as to whether any action brought by the trusts to recover Employer Contributions is justiciable in Admiralty at all.<sup>15</sup>

Even if it is justiciable in Admiralty, not every such contract gives rise to rights *in rem*. It is still necessary to recognize, as was done in *The Golden Sail*, 197 F. Supp 777 (discussed *infra*), the “essential difference between union bargaining agreements of workers ashore” on the one hand, and the “signing of ship's articles between the seaman and the master of the vessel for the voyage” on the other. The former, of course, gives the seaman a right *in rem* against the vessel, but

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15. This issue was not reached in any of the decisions referred to *infra*, p. 16 involving Employer Contributions, since in each of these cases the action was commenced as an Admiralty suit to foreclose a preferred ship mortgage in which the trusts' intervening claims were simply denied.

“the trustees’ claim under the union bargaining agreement [to recover Employer contributions] is an action *in personam* against the signatory owners thereof” (197 F. Supp. 777, 779).

### III.

#### **APPELLANTS' POSITION IS UNSUPPORTABLE IN ITS OWN RIGHT**

##### **1. The existing law on the subject is to the contrary.**

The precise issue here involved has been considered in the following cases:

*The Ozark*, (5 Cir. 1962) 304 F. 2d 717, 1962 A.M.C. 1675; cer. den. 371 U.S. 923, 9 L. Ed. 2d 231, 83 S. Ct. 291, 1963 A.M.C. 281;

*The Denton*, (5 Cir. 1962) 302 F.2d 404, 1962 A.M.C. 1730 (affirming 1960 A.M.C. 2264);

*The Golden Sail*, (D. Or. 1961) 197 F. Supp. 777, 1962 A.M.C. 2676;

*The Kingston*, (S.D. Texas) 1961 A.M.C. 1321.

Appellant does not even pretend that these decisions are distinguishable. Although it is apparent from the opinion herein (CT 532-543) that the trial court’s decision was reached independently of them, they constitute the state of the law on the subject and they uniformly reject Appellants’ position.<sup>16</sup>

It is suggested (Ap. Br. 39-40) that *Denton* is wrong because premised on the proposition that the seaman’s wage

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16. In an effort to dilute the numerical weight of this body of precedent Appellants discuss only *Denton*, relegating *Ozark*, *Golden Sail* and *Kingston* to the indignity of a mere footnote citation (Ap. Br. 39). Yet in *Golden Sail* the Court was already “about to conclude the issue adverse to the trustees” (197 F.Supp. at 778) before the Commissioner’s report in *Denton* was called to its attention, and the report in *Kingston* does not even mention *Denton*. Only *Ozark* can fairly be characterized as an echo.



lien extends only to the wages specified in shipping articles. However, while it is true that formal shipping articles are not mandatory in the coastwise trade and are, therefore, frequently not used, and that a lien nevertheless exists to collect wages earned on such voyages, it is *not* true that the result in *Denton* hinged on the existence of articles. Because articles happened to be used on the voyages before it the Court's remarks were understandably oriented in that direction. What the Court obviously had in mind, however, is the *kind* of payments dealt with in shipping articles, viz., payments which the workers receive directly to use as they wish and are entitled to sue for if necessary. Witness St. Sure confirmed (RT 114:15-22) that so far as wages and benefits are concerned, there is *no difference* between a foreign and a coastwise voyage. Thus the basic differentiation between Employer Contributions due to the trusts and cash payments due to the men, which is the basis of the decision in *Denton*, applies whether formal shipping articles are in effect or not.

## **2. The basic error in appellants' theory of the case.**

The fundamental error in appellants' whole position is the attempt to equate Employer Contributions with "wages of the crew of the vessel", coupled with a failure to recognize that the rationale underlying availability of a lien to secure the latter has no application to the former.

Although they redound to the ultimate benefit of a class of workers which includes crew members, Employer Contributions are a far cry from "wages of the crew of the vessel". They are not owed to or collectible by any sea-going wage earner (*supra* p. 7), nor is there any identifiable connection between the amount due from a particular employer and the compensation earned by a particular seagoing wage-earner or group thereof. The documents creating the obli-



gation state that they are not “wages” (supra p. 7). They are commingled with other monies in a fund in which no wage-earner, seagoing or otherwise, has a legal interest (supra p. 7) and a substantial part of which is used for payments to other than sea-going wage-earners (supra p. 3). A crew member on account of whose employment the contribution becomes due may or may not receive benefits from the trust (supra p. 8). As succinctly stated by the trial court (CT 539:1-3): “These contributions are a means of financing the trust funds but they *do not constitute the compensation to which any seaman is or may become entitled.*” (Emphasis added.)

Just as Employer Contributions are not “wages” due to sea-going workers, so is it equally true that the trusts cannot be classed as the “crew of the vessel” for Appellants’ purposes. No one questions the sanctity of a seaman’s wage lien, or denies that the seaman serving aboard the libelled vessels during their Coastwise/Dorama operation performed maritime services of the kind which give rise thereto; had any such seaman not received everything due him and sought relief, quite different questions would be presented in this case, as the Trial Court noted (CT 539:10-19). Such liens, however, were created and exist for the protection of a particular class, viz. seafaring workers—the familiar “wards of the Admiralty Court.” In contradistinction, Appellants are highly sophisticated institutions, professionally managed and supervised by employer and union officials. Whereas a wage lien is appropriate to protect a worker in the event of his employer’s insolvency, appellants are quite capable of assuring unimpaired operation of the trusts notwithstanding such a misfortune, as demonstrated by the very failures of Coastwise and Dorama which gave rise to the instant action. Employer Contributions are at present guaranteed by the Pacific Maritime Association

(supra p. 5). Should this security ever be felt inadequate, appellants can at any time require performance bonds, collateral deposits and/or advance payments as a condition to permitting the ships to be manned. They hardly need a maritime lien outranking all others to collect amounts which they have been able to arrange to have guaranteed by the entire West Coast shipping industry.

In short, Employer Contributions fail to qualify for a "Seaman's Wage" lien on both counts descriptive of this characterization, and none of the reasons for which such a lien exists have application to them.

### **3. Incompatibility of appellants' position with the fact that all seamen have been paid in full.**

Further error occurs in appellants' futile efforts to explain how a lien can survive after the debt it is supposed to secure has been paid—i.e., to answer the question put by the Trial Court during opening arguments (RT 26:14): "Where is the existing unpaid compensation which would give rise to the lien?" Cases on assignability of a wage lien are cited (Ap. Br. 27) but no assignments were executed. This leaves only the possibility of subrogation.<sup>17</sup>

There are several reasons why subrogation is inapplicable. In the first place: "... one cannot acquire by subrogation what another whose rights he claims did not have." *United States v. Munsey Trust Co.*, 332 U.S. 234, 242. (See *Am. Jur. "Subrogation"* § 110, footnote 13, citing cases.) As noted above, (p. 7), the very documents which create the obligation to make Employer Contributions declare that the seamen have no interest therein. Thus, there is no seaman-

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17. "It is elementary that before there can be a lien for wages of the crew there must be a member of the crew whose wages have not been paid, except in cases of true subrogation" (District Court opinion in *Denton*, 1960 A.M.C. 2264, 2278).



vested right to sue for or receive these payments to which appellants *could* become subrogated.

Furthermore, there is no group of seamen which has received the precise amount here sought, as would have to be the case were subrogation involved. Indeed, there is no evidence as to the amount received by *any* seaman or group thereof, and this alone is fatal to subrogation. “[The] right to a maritime lien as to seamen’s wages advanced being claimed by subrogation, it is incumbent on libellant . . . to show the individual seamen paid and the amounts paid each.” *The Englewood*, 57 Fed. 2d 319, 320. In any event, in paying out benefits to seamen, appellants are not advancing monies owed to them by some other party, as is the situation where subrogation arises, but are simply discharging claims for which they, and they alone, are liable. Coastwise Line and Dorama were not liable to or sueable by the seamen aboard the five libelled vessels for such benefits as the latter may ultimately have received from the trusts. Their only obligees were appellants, and it was the *latter* to whom the seamen could look for the benefits. Subrogation

“is allowed only in favor of one who pays the debt of another, which debt was a valid enforceable obligation against that person, and subrogation is not allowed in favor of him who pays a debt in performance of his own obligation . . .” *C.J.S. “Subrogation”* §8.

Another difficulty in trying to apply the principle of subrogation here is that the money which is used to pay benefits does not in any fair sense come from the trusts but from those who finance the trusts. Thus, if subrogation *were* applicable, the rights acquired should pass and belong, at least beneficially, to the contributing employers. Accepting this premise, it is well established that maritime liens cannot be acquired by subrogation where (as in the case of



Employer Contributions) the monies advanced are used indiscriminately for various purposes, some lienable and some not. *I.R.O. v Maryland Drydock Co.*, 179 F.2d 284, 289-290; and see *Piedmont Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 13.

In the cases cited by appellant permitting succession to the seamen's lien by another (Ap. Br. 26-28), the money was advanced and used solely for the payment of specific, identifiable, then due wage claims, and the intention of standing in the shoes of the wage claimants so far as security of the vessel was concerned was readily discernable. In fact, in the two *Brock* cases cited by appellant the subrogee advanced the money only under a letter of credit running to an agent of the crew to assure that it would be used only for the payment of crew wages. No such earmarking or intention characterizes the payment by PMA members of Employer Contributions, accruing with inexorable regularity and paid with full knowledge that they will lose identity in the corpus of a trust from which many disbursements are made to other than seamen.

#### **4. The "wage package" fallacy.**

A further error is the suggestion (Ap.Br. 9-11) that because changes in welfare, pension, and vacation benefits are negotiated along with changes in base wages on a so-called "package" basis the lien which the law provides for the latter becomes applicable as well as to the former. Although Appellants refer to it as a "*wage package*" the PMA witness (Mr. St. Sure) described it as a "*cost package*" (RT 72:24; RT 74:7; RT 90:21). He testified (RT 93:6-11) that the unions:

“. . . want the same costs to be put into their pocket by the employer to match what the other fellow got

percentage-wise, even though it may not be in direct wages; it may be in welfare, pensions, medical centers, training schools or what have you."

It is evident that the "package" appellation is nothing but a reflection of the fact that the basis used in collective bargaining negotiations is over-all *cost* to the employers. How much of that cost goes into the men's pockets (as wages), how much goes to the trusts (as Employer Contributions), and how much to other projects, such as "medical centers, training schools or what have you", is of little importance to the companies; their only concern is the amount of the total labor *cost*.

The fact that the various cost components are lumped together for collective bargaining purposes, or that an over-all sum once negotiated is thereafter allocated (by the Unions, Ap.Br. 10) amongst those components, does not mean that the components in question change character or take on the attributes of others. The term "package" in the sense utilized is no more than a metaphor, descriptive enough to be useful if so understood but devoid of any metaphysical properties which can affect the character of the components which it collectively describes. The components themselves retain whatever attributes they had. A wage is a wage, whether it is in or out of the "cost package", and the same applies to Employer Contributions. One is not the other (pp. 17-19 *supra*) even though the employer pays both. It is the kind of payment involved, not the manner in which it is negotiated, that determines lien status.

One further brief comment: The "package" argument is not a new one. In *Embassy Restaurant* (discussed *infra* p. 25) the court noted:

"It is contended, however, that since 'unions bargain for these contributions as though they were wages' and industry likewise considers them 'as an integral part



of the wage package,' they must in law be considered 'wages'," (359 U.S. 29, 33.)

The contention was rejected on the ground that this was merely descriptive of a business practice.

**5. The actions cannot be regarded as suits for the benefit of seamen.**

To meet the difficulty that the parties here seeking to enforce a wage lien are not wage-earners, Appellants suggest that the suits are representative actions, brought "not . . . for themselves but for the beneficiaries" (Ap.Br. 38).

One difficulty with this is that, as noted above p. 3, many of the beneficiaries are shoreside workers to whom the asserted lien is not available even in a direct action. A more basic difficulty is the fact that by stipulation no beneficiary will be affected in the slightest by the outcome of these suits because the quantum of benefits received and to be received is the same whether a recovery is effected or not (CT 290:15-30). As the trial court noted (CT 539:24-28) a suit to recover a delinquent Employer Contribution, rather than being for the benefit of the beneficiaries, is "more for the protection of the other steamship companies against increase of their rate of compensation by reason of default of one or some of them."<sup>18</sup>

**6. The wage lien cases relied on by appellants are inapposite.**

The fact that the Employer Contributions are not payable to or collectible by a wage-earner decisively distin-

---

18. Because the delinquencies here sought are so miniscule as compared to the enormous sums passing into and out of the trusts every year—\$13,480,156.46 in 1960 (Vessel's Exhibit F 7:6) and many times that as of today—and because there is no reasonable possibility that any of the trusts will ever become insolvent, it is more probable that the only party who might conceivably benefit by a recovery in this case would be the residual beneficiary named to receive the balance of the corpus should the trust ever terminate.



guishes the instant suits from all of the decisions cited in Ap. Br. 21-22 in which maritime wage liens have been enforced for the recovery of various "forms of compensation other than base wages," including *Gayner v. The New Orleans* digested and strongly relied on. In all of these decisions the plaintiffs were seamen, and the sums recovered, whether in the form of extra hazard bonus, maintenance, fishing lays, war bonuses, wages due on breaking up of the voyage, wages due during idle status, discharge benefits as in *Gayner*, the statutory double pay penalty for tardy payment of wages or the statutory extra pay penalty for improper discharge, were sums *owing and payable directly to the seaman*, to do with as he wishes. In the case of the instant suits, by contrast, if a recovery were to be effected "no part of the amount thereof will be distributed . . . to any individual beneficiary . . . but the amount of such recovery will be added to the corpus." (CT 290:8-13.)

**7. Determinations by the interested Government agency as to which labor cost items qualify for the allowance of a subsidy have nothing to do with the issues in this case, and, if they did they do not support appellants' contention.**

Appellants' allusion to the Federal Maritime Administration "Manual of General Procedures for Determining Operating-Differential Subsidy Rates" (Ap. Br. 31) is preposterous. The Secretary of the Subsidy Board testified that FMA pays no attention in its deliberations to what may or may not give rise to a maritime lien (Trust Exhibit 4, p. 16). He testified that under the applicable statute (46 U.S.C. 603 (b)) a subsidy is paid with respect to ". . . , wages and subsistence of officers and crews, and any other item of expense in which the Board shall find . . . that the Applicant is at a substantial disadvantage . . . with foreign flag competitors," and that the listing of the cost

of Employer Contributions under “wages of officers and crew” in the Manual was done purely as an administrative expediency—that such costs actually “fall within the category of ‘other items of expense’ ” (p. 6). In any event, he further testified (p. 13-14) that certain payments which do *not* give rise to a maritime lien (viz., FICA and Federal Unemployment Taxes and State Unemployment Compensation Taxes)<sup>19</sup> are *included* in the definition of wages for subsidiary purposes, while other items that *do* give rise to a maritime lien (viz. extra pay earned by the steward’s department for serving meals to noncrew members) are *excluded* from that definition. Graphically illustrating the irrelevance of action by the Subsidy Board to the issues of this case is the ruling disallowing for subsidy purposes the wages of two dining room captains and an assistant cook employed aboard the passenger liner *SS United States* (Vessel’s Exhibit 14).

**8. Appellants' preference for *United States v. Carter* rather than *Embassy Restaurant* is misplaced.**

Appellants seek support from *United States v. Carter*, 353 U.S. 210, imposing liability on a Miller Act surety for contributions to “fringe benefits.” However, the later Supreme Court decision in *United States v. Embassy Restaurant*, 359 U.S. 29, holding that Employer Contributions to a welfare fund of the exact type here involved are not “wages” for priority purposes under the Bankruptcy Act is far more analagous. And in giving reasons for denying “wage” status to Employer Contributions, the Court in *Embassy Restaurant* made several observations having direct application to the instant suits. Thus, the Court noted (32-33):

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19. Government tax liens are not maritime liens and are out-ranked by the latter. *United States v. Flood*, 247 F. 2d 209; *United States v. Jane B. Corp.*, 167 F. Supp. 352, 356.



“It [the Employer Contribution] is due the trustees not the workmen, and the latter has no legal interest in it whatsoever. A workman cannot even compel payment by a defaulting employer. Moreover, it does not appear that the parties to the collective agreement considered these welfare payments as wages. The contract . . . refers to them as ‘contributions’ . . . [The employer’s] obligation is to contribute sums to the trustees, not to its workmen; it is enforceable only by the trustees, who enjoy not only the full title but the exclusive management of the funds.”

The Court points out a further reason for denying bankruptcy priority, which applies with equal force to the asserted lien status. Thus, the Court stated (pp. 33-34):

“These payments, owed as they are to the trustees rather than to the workman, *offer no support to the workman in periods of financial distress* . . . if the claims of the trustees are to be treated on a par with wages, in a case where the employer’s assets are insufficient to pay all in the [wage] priority the workman will have to *share with the welfare plan, this reducing his own recovery.*” (Emphasis added.)

In the same manner, in the event of a casualty where the company is insolvent and the wreck value of the vessel is insufficient to effect payment of accrued take-home pay, amounts due the trusts for Employer Contributions, would, if given lien status, share in the wreck proceeds and reduce the recovery of the very sums which it has been the historic policy of the law to jealously protect.

It is to be noted further, that the purpose ascribed by the Court to the priority given wages by the Bankruptcy Act—viz. the providing of a “‘protective cushion’ against economic displacement caused by his employer’s bankruptcy”—is equally the purpose served by a lien. It is difficult to



see why considerations denying a priority ranking should not have like effect on a lien.

### CONCLUSION

Whenever a business concern fails, some of its debts will be unpaid. Laborers enjoy a law-given preference. Security holders enjoy the preference they have bargained for. Those who have extended credit must take what is left.

This is all that has happened here. Appellant trusts are unsecured creditors. They have advanced no reason why they should be entitled to shoulder aside statutory preferred ship mortgages, outrank other high priority liens such as for general average, salvage, etc., and compete with wage-earners for the mythical "last plank." There are many reasons why they should not.

Wage lien status for Employer Contributions is incompatible with the provisions of the very contracts which give them existence (Supra pp. 7, 8).

Wage lien status is incompatible with the decision of the United States Supreme Court in the *Embassy Restaurant* case (Supra pp. 25, 26).

Wage lien status has been rejected by every court which has considered the question (Supra p. 16); *stare decisis* alone compels dismissal of appellants' claims.

Should wage lien status exist, it would be illegal for the trusts to receive the monies (Supra pp. 12, 13)

Wage lien status for amounts payable on account of the employment of shipmasters would give the trusts rights denied to the worker himself (Supra p. 14).

Wage lien status would seriously impair the value of a Congressionally-created and Congressionally-favored security device—the preferred ship mortgage—and do so by thwarting a firmly established and discerning principle of law, viz. that which forbids the extension of secret liens by analogy (Supra pp. 9-11).

Wage lien status will not benefit or affect any crew member since all obligations to crew members have been and will be met regardless of the outcome of these suits. The appeals should be dismissed.

Respectfully submitted,

JOHN HAYS

GEORGE L. WADDELL

DORR, COOPER & HAYS

*Attorneys for Appellee  
Pacific Far East Line, Inc.*

#### **CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN HAYS

*Attorney*

**(Appendices follow)**







# Appendix A

(EXCERPTS FROM VESSEL'S EXHIBIT A)

"MMP-PMA Pension Fund

Detail of Investments in Securities

January 31, 1963

Face Value	Corporate Bonds	Cost	Market Value
25,000	American Telephone and Telegraph Company, Debentures, 4 $\frac{3}{8}$ % due 4-1-85 .....	\$ 24,812.50	\$ 25,750.00
25,000	American Telephone and Telegraph Company, Debentures, 4 $\frac{3}{8}$ %, due 10-1-96 .....	25,341.61	25,546.88
25,000	American Telephone and Telegraph Company, Debentures, 4 $\frac{3}{4}$ %, due 6-1-98 .....	25,314.61	26,718.75
25,000	Armco Steel Corporation, 4.35%, due 4-1-84 .....	24,812.50	25,625.00
50,000	C.I.T. Financial Corporation, 4 $\frac{5}{8}$ %, due 1-1-79 .....	48,700.00	51,750.00
25,000	Cleveland Electric Illuminating Company, 4 $\frac{3}{8}$ %, due 4-1-94.....	24,875.00	25,625.00
25,000	Consolidated Edison of New York, 1st Ref., 4 $\frac{5}{8}$ %, due 11-1-91.....	25,531.25	26,156.25
35,000	Federal Land Bank Consolidated Farm Loan, 4 $\frac{1}{2}$ %, due 2-20-74.....	35,227.73	36,316.00
25,000	General Motors Acceptance Corporation, Debentures, 4%, due 3-1-79.....	23,718.75	24,656.25
25,000	General Motors Acceptance Corporation, Debentures, 4 $\frac{5}{8}$ %, due 3-1-83	25,026.50	25,906.25
15,000	General Motors Acceptance Corporation, 5%, due 3-15-81.....	14,930.37	15,937.50
25,000	Illinois Bell Telephone Company, 1st, 4 $\frac{3}{8}$ %, due 3-1-94 .....	24,882.72	24,687.50
50,000	Illinois Power Company, 1st Mortgage, 4 $\frac{1}{4}$ %, due 1993.....	50,436.00	50,437.50
25,000	Lone Star Gas Company, S.F. Debentures, 4 $\frac{1}{2}$ %, due 4-1-87.....	25,477.11	25,593.75
25,000	National Steel Corporation, 1st Mortgage, 4 $\frac{5}{8}$ %, due 6-1-89.....	24,757.60	25,875.00
25,000	New England Telephone and Telegraph Company, Debentures, 4 $\frac{5}{8}$ %, due 4-1-99 .....	24,875.00	25,593.75
35,000	New York Telephone Company, Refundable Mortgage, 4 $\frac{1}{2}$ %, due 5-15-91 .....	33,643.75	36,225.00

## (EXCERPTS FROM VESSEL'S EXHIBIT A [CONTINUED])

## MMP-PMA Pension Fund

Detail of Investments in Securities, Continued  
January 31, 1963

Face Value	Corporate Bonds	Cost	Market Value
46,000	Northern Illinois Gas Company, 5%, due 6-1-84 .....	46,339.79	48,760.00
25,000	Pacific Gas and Electric Company, 1st and Refundable Mortgage, dated 12-1-62, 4 $\frac{1}{4}$ %, due 6-1-95.....	25,007.10	25,062.50
50,000	Pacific Gas and Electric Company, 1st Mortgage, 5%, due 6-1-91.....	49,351.35	53,031.25
35,000	Pacific Telephone and Telegraph Company, 4 $\frac{5}{8}$ %, due 11-1-90.....	35,806.25	36,225.00
25,000	Pacific Telephone and Telegraph Company, 5 $\frac{1}{8}$ %, due 2-1-93.....	25,307.10	25,937.50
50,000	Pennsylvania Power and Light Company, Mortgage, 4 $\frac{5}{8}$ %, due 12-1-91	50,623.48	51,937.50
50,000	Philadelphia Electric Company, 1st, 5%, due 10-1-89 .....	50,187.50	53,031.25
25,000	Public Service Company of Colorado, 1st Mortgage, 4 $\frac{5}{8}$ %, due 5-1-89.....	25,305.00	26,000.00
25,000	Public Service Electric and Gas Company, 1st Redeemable, 4 $\frac{5}{8}$ %, due 8-1-88 .....	25,750.00	26,171.88
25,000	Public Service Electric and Gas Company, 1st Redeemable, 5 $\frac{1}{8}$ %, due 6-1-89 .....	25,490.35	26,437.50
25,000	Southern California Edison Company, 1st Refundable, 4 $\frac{1}{4}$ %, due 11-1-87	25,102.11	25,187.50
30,000	Southern California Edison Company, 1st Refundable, 5%, due 2-1-85.....	30,342.90	31,575.00
25,000	Southern Electric Generating Company, 1st, 5 $\frac{1}{4}$ %, due 6-1-92.....	25,402.35	26,375.00
50,000	Southwestern Bell Telephone Company, Debentures, 4 $\frac{5}{8}$ %, due 8-1-95	50,653.50	51,437.50
25,000	Standard Oil Company of Indiana, Debentures, 4 $\frac{1}{2}$ %, due 10-1-83.....	24,875.00	25,812.50
25,000	United Gas Corporation, 4 $\frac{5}{8}$ %, due 6-1-82 .....	25,318.78	26,093.75
Total corporate bonds.....		1,023,225.56	1,057,476.01



## (EXCERPTS FROM VESSEL'S EXHIBIT A [CONTINUED])

## MMP-PMA Pension Fund

Detail of Investments in Securities, Continued  
January 31, 1963

Shares	Common Stock	Cost	Market Value
200	American Telephone and Telegraph Company .....	23,551.96	24,200.00
1,200	California Packing Corporation.....	32,081.01	30,600.00
300	Chase Manhattan Bank.....	21,713.50	25,312.50
400	Commonwealth Edison Company.....	16,809.76	19,600.00
400	Continental Can Company .....	20,901.98	18,300.00
250	Continental Casualty Company .....	14,505.00	21,031.25
700	Crocker-Anglo National Bank .....	21,400.00	38,062.50
430	Crown Zellerbach Corporation .....	21,124.05	21,446.25
200	Dow Chemical Company .....	14,993.90	11,825.00
125	E. I. du Pont de Nemours and Company .....	23,213.17	30,718.75
800	Federated Department Stores Incorporated .....	22,104.75	36,900.00
300	Florida Power and Light Company.....	17,596.96	21,900.00
600	Food Fair Stores Incorporated.....	22,651.64	14,625.00
300	General Electric Corporation .....	22,391.45	23,475.00
200	General Foods Corporation .....	15,093.50	16,875.00
463	General Motors Corporation .....	22,426.44	29,111.13
300	Hartford Fire Insurance Company.....	19,851.00	22,950.00
600	Hercules Powder Company .....	17,535.38	23,925.00
75	International Business Machine Corporation .....	17,984.26	31,781.25
700	Lockheed Aircraft Corporation .....	33,061.32	36,050.00
300	Merck and Company Incorporated.....	23,266.03	25,800.00
400	National Dairy Products Corporation .....	20,052.08	26,400.00
200	National Lead Company .....	22,101.10	14,450.00
1,000	Philadelphia Electric Company .....	26,135.24	32,750.00
800	Public Service Company of Indiana...	26,885.04	28,500.00
500	Public Service Electric and Gas Company .....	20,634.85	35,812.50
700	Safeway Stores Incorporated .....	27,357.24	32,025.00
1,248	Southern California Edison Company .....	24,193.37	40,404.00
525	Standard Oil Company of California .....	25,128.47	34,125.00
600	Standard Oil Company of New Jersey .....	29,961.57	36,000.00
513	Stauffer Chemical Company .....	23,796.07	18,596.25
Total common stocks .....		690,502.09	823,551.38
Total investments in securities, page 2 .....		\$1,713,727.65	\$1,881,027.39

**Appendix B****KEY TO LOCATION OF VARIOUS PROVISIONS  
IN THE GOVERNING DOCUMENTS****(VESSEL'S EXHIBIT 2)**

The following is a key to the location of sentences in the trust documents stating that contributions shall not constitute wages:

(The documents in question are to be found in Vessel's Exhibit 2, each set being identified by a marginal tab carrying the name of the Trust.)

Trust	Location
MMP Vacation .....	Declaration of Trust p. 4, § 4(b)
MMP Welfare .....	Declaration of Trust p. 4, § 4(b)
MEBA Vacation .....	Declaration of Trust p. 4 & 5, § 4(b)
MEBA Welfare .....	Declaration of Trust p. 4, § 4(b)
ARA Vacation .....	Declaration of Trust p. 4 & 5, § 4(b)
ARA Pension .....	Agreement p. 22, Art VIII
ARA Welfare .....	Declaration of Trust p. 4, § 4(b)
SIU Pension .....	Declaration of Trust p. 4, § 4(b)
MSO Welfare .....	Declaration of Trust p. 5, § 4(b)
SUP Welfare .....	Supplemental Agreement p. 11 & 12, XI
MFOW Welfare .....	Amended Declaration of Trust p. 8, § 4(b)

The following is a key to the location of provisions denying to the beneficiaries any right to collect or interest in the Employer Contributions:

Trust	Location
MMP Vacation .....	Agreement, XI, (p. 18) Declaration, § 4(a), (p. 4)
MMP Pension .....	Declaration II § 3, (p. 2)
MMP Welfare .....	Agreement, § 6(3)(g) (p. 12-13)
MEBA Vacation .....	Agreement, XI, (p. 12) Declaration, § 4(c), (p. 5)
MEBA Pension .....	Declaration II § 3, (p. 2)
MEBA Welfare .....	Declaration, § 4, (p. 4)

Trust	Location
ARA Vacation .....	Agreement, XI, (p. 16)
	Declaration, § 4(c), (p. 5)
ARA Pension .....	Declaration, II § 3, (p. 2)
ARA Welfare .....	Agreement, § 2(c) (p. 5)
SIU Pension .....	Declaration, § 4c (p. 4)
MSO Welfare .....	Agreement, § 2c, (p. 6)
	Declaration, §4c, (p. 5-6)
SUP Welfare .....	Agreement, XII (p. 12)
MFOW Welfare .....	Agreement, § 6(j), (p. 10)
MCS Welfare .....	Agreement, XI, (p. 11)
SIU Supplemental Benefits .....	Agreement, XI, (p. 18)

The following is a key to the provisions denying to the beneficiaries any right to or interest in the corpus of the trust:

Trust	Location
MMP Vacation .....	Agreement, Art. XI, (p. 18)
MMP Pension .....	Agreement, Art. XI, (p. 33)
MMP Welfare .....	Agreement, § 6(3)(g) (p. 12-13)
MEBA Vacation .....	Agreement, Art. XI, (p. 12)
MEBA Pension .....	Agreement, Art. XI (p. 28)
MEBA Welfare .....	Declaration § 4(a) (p. 3)
ARA Vacation .....	Agreement, Art. XI (p. 16)
ARA Welfare .....	Declaration § 4(a) (p. 4)
SIU Pension .....	Agreement Art. XI, (p. 24)
MSO Welfare .....	Declaration § 4(a) (p. 5)
SUP Welfare .....	Agreement Art. XII, (p. 12-13)
MFOW Welfare .....	Agreement § 6(j) (p. 11)
MCS Welfare .....	Agreement Art. XI (p. 11)
SUP Supplemental Benefits .....	Agreement Art. XI (p. 18)



***Appendix C***

**LETTER FROM EXECUTIVE SECRETARY, C.I.O. MARITIME COMMITTEE TO  
HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE  
(PAGE 19 OF VESSEL'S EXHIBIT C)**

"CIO Maritime Committee

Washington 3, D. C., September 14, 1950

The Honorable Edward J. Hart  
Chairman, House Merchant Marine  
and Fisheries Committee,  
House Office Building, Washington, D. C.

Dear Congressman Hart: We are opposed to H.R. 8349, a bill to authorize deductions from the wages of seamen for payment into employee welfare funds.

Before the passage of protective laws seamen's wages were subjected to many unjust deductions. Deductions from seamen's wages should be made only for taxation purposes and other purposes that do not lead to a general depletion of take-home pay. Deductions for welfare funds will open the door for other deductions. This we most definitely oppose.

The philosophy of American labor unions is that pension and welfare plans fall within the scope of responsibility of the industry to which the workers devote their lives. This philosophy is being realized in American industry today. For example more and more American companies are accepting pension and welfare plans based on employer contributions only.

The CIO seamen's unions and maritime management have agreed to a pension and welfare fund based on employers' contributions only. This is a sound principle and should be retained.

Because your committee is so familiar with the necessity of retaining protective laws applying to deductions from seamen's wages, we cut our statement short. We shall be glad to enlarge this statement if so requested.

Sincerely yours,

Hoyt S. Haddock  
Executive Secretary."

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOHN A. CROSS, et al.,  
Appellants,  
vs.

S. S. KAIMANA, her engines,  
etc., et al.,  
Appellees.

MAY 11 1968  
No. 21719

S. S. LANAKILA, her engines, etc.,  
et al.,  
Appellees.

No. 21719A

S. S. ALASKA BEAR, her engines,  
etc., et al.,  
Appellees.

No. 21719B

S. S. PACIFIC BEAR, her engines,  
etc., et al.  
Appellees.

No. 21719C

S. S. COAST PROGRESS, her engines,  
etc., et al.  
Appellees.

No. 21719D

BRIEF OF APPELLEE  
UNITED STATES

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Attorneys for Appellee  
United States of America

FILED

MAY 2 1968

WM. B. LUCK, CLERK





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## ARGUMENT

1. No jurisdiction exists since the contract underlying Appellants' action was made between the steamship companies association (PMA) and the Unions and is not a maritime contract. 9
2. It is judicially established that employer contributions to benefit plans of the type here involved are not maritime liens and are not entitled to status as "wages of the crew of the vessel" within the meaning of 46 U.S.C. §953. 16
3. Collective bargaining for a mislabelled "wage package" does not give Appellants a seaman's lien for wages. 27
4. The trust funds include employer contributions for the benefit of masters and shore-side personnel, neither of whom can assert a seaman's wage lien. 29



5.	If the employer contributions are held "seamen's wages", the applicability of 46 U.S.C. §599(g) would preclude Appellants' recovery on the grounds of illegality.	30
6.	Any alteration of the existing statutory maritime lien law should be left to the Congress.	31
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vs.

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etc., et al.,  
Appellees.

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JOHN A. CROSS, et al.,  
Appellants,  
vs.

No. 21719D

S. S. COAST PROGRESS, her engines  
etc., et al.,  
Appellees.

---





BRIEF OF APPELLEE  
UNITED STATES

Opinion Below

The opinion of the District Court is reported at 265 F. Supp. 723 (N.D. Cal. 1967).

Jurisdiction

This is an appeal from a judgment of the District Court entered on February 21, 1967. Notice of Appeal was filed on March 21, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. §1291.

Questions Presented

The basic issues involved in all five proceedings are whether Appellant-Trustees' claims for contributions to certain vacation, pension and welfare funds, which became due and owing from the shipowners, can be asserted as maritime liens and, if so, whether they are entitled to "preferred" maritime lien priority against the vessels as "wages of the crew of the vessel" within the meaning of 46 U.S.C. §953.



## Statutes Involved

46 U.S.C. §599(g) - The provisions of this section shall not apply to, or render unlawful, deductions made by an employer from the wages of a seaman, pursuant to the written consent of the seaman, if (1) such deductions are paid into a trust fund established for the sole and exclusive benefit of seamen employed by such employer, and their families and dependents (or of such seamen, families, and dependents jointly with seamen employed by other employers and their families and dependents); and (2) such payments are held in trust for the purpose of providing, either from principal or income or both, for the benefit of such seamen, their families, and dependents, medical and/or hospital care, pensions or retirement or death of the seamen, life insurance, unemployment benefits, compensation for illness or injuries resulting from occupational activity, sickness, accident, and disability compensation, or any one or more of the foregoing benefits, or for the purpose of purchasing insurance to provide any one or





more of such benefits.

46 U.S.C. §953 - Preferred maritime lien; priorities; other liens.

(a) When used hereinafter in this chapter, the term "preferred maritime lien" means

(1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all preexisting claims in the vessel, including any possessory common-law lien of which lienor is deprived under the provisions of section 952 of this title, shall be held terminated and shall





thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court.

### Statement

Appellants herein are trustees of fifteen trusts established by collective bargaining between the Pacific Maritime Association (herein PMA) and the several unions representing crew members on American Flag vessels sailing out of West Coast ports. The trusts (herein "benefit plans") provide vacation, pension, and welfare benefits (sickness, accident, and disability compensation, medical and hospital care for seamen and their dependents, recreation and educational facilities, etc.).

At the time during which the amounts sought to be recovered by the trustees accrued and became due, Coastwise Line and Dorama, Inc., were



Steamship companies operating the five libelled vessels (T. 275:32; 276:1-14). Both companies became insolvent and without sufficient funds to make any appreciable payments to the benefit plans.

Appellee Pacific Far East Line (herein PFE) was the holder of preferred ship mortgages on SS KAIMANA and SS LANAKILA and is the owner of SS PACIFIC BEAR and SS ALASKA BEAR (T. 277:7-15). Appellee United States was the holder of a preferred ship mortgage on SS COAST PROGRESS (T-277:15-19). Both PFE and the United States have executed their preferred ship mortgages and resist the claims of the trustees at issue here on the grounds that they have valid mortgage liens against the ships and that the trustees' claims do not have the security of a maritime lien.

The corpus of each trust or benefit plan is made up of payments made by the steamship operators to the trustees (referred to as "employer contributions") plus income on the invest-





ments of the fund by the trustees, plus, in the case of some of the Welfare Plan Trusts, contributions from the employees themselves. The employer contributions are paid directly to the trustees and never to the seamen. The seamen themselves have no right to the employers' payments into the funds (T. 287:8-10; 290:8-13).

Persons realizing advantages from these benefit plans are not solely seamen. The plans encompass union officials and other shore-based personnel having no connection with the ships involved in this litigation, or for that matter, any other ship (T.277:25-31).

In no instance has an individual beneficiary of any trust here involved been denied a benefit because of the fact that the particular sums sought to be recovered by the trustees in the present suits were not paid into the trust (T. 285:32; 286; 1-3; 290:14-30).

After trial upon a "Stipulation as to Certain Facts and Other Matters" and certain testimony and exhibits introduced at trial, the District Court held that





. . . the trustees' claims for contributions are not entitled to the seaman's maritime lien or to preference as "wages of the crew of the vessel" within the meaning of 46 U.S.C. §953. (T.542:30-32; 543:1.)

#### Summary of Argument

The questions presented here are whether unpaid employer contributions to certain union benefit plans constitute maritime liens and, if so, whether they are entitled to preferred maritime lien priority as "wages of the crew of the vessel" within the meaning of 46 U.S.C. §953. Relying on United States v. Embassy Restaurant, Inc., 359 U.S. 29, 34 (1959) and Brandon v. SS Denton, 302 F.2d 404, 415 - 16 (5 Cir. 1962), the District Court answered both questions in the negative. We believe that the District Court's reliance on Embassy and The Denton was proper and that those cases are controlling herein.



## ARGUMENT

- (1) No jurisdiction exists since the contract underlying Appellants' action was made between the steamship companies association (PMA) and the Unions and is not a maritime contract.

The contract which is the basis of the trustees' claim for employer contributions is a contract executed by and between the shipping companies forming PMA and the labor unions (T.274:24-31). The basis of Appellants' action is not, as they suggest, a claim for the agreed compensation of seamen for the performance of maritime services. Appellants would equate employer contributions with "seamen's wages."

It is critical to recognize, as did the Trial Court, that:

. . . the contributions in question are due and payable, not to the seamen, but to the trustees. The collective bargaining agreement expressly states that the contributions from the steamship companies are payable only to the trustees, not the employees,





and that covered employees have no right, title, interest or claim in or to their employer's or any other employer's contributions to the trust funds. (T.537:7-14)  
(Emphasis added.)

For a claim to be recognizable in admiralty there must be a maritime connection. The necessary jurisdictional fact in seamen's wage claims is that the men perform maritime services. It is admitted herein that the seamen performed maritime services aboard the five vessels, and it is also admitted that the seamen received all wages accruing to them (Ap. Br. 28).

Appellants rely on Harden v. Gordon, 11 Fed. Cas. 480 (C.C.D. Me. 1823) (Ap. Br. 17) in arguing that admiralty jurisdiction is applicable here. In that case, the plaintiff seaman sued his employer for expenses incurred in the cure of a sickness. Clearly, the case involved a suit by a seaman for compensation for the performance of maritime services. That is not





the case before this Court. Appellants here, being unable to collect employer contributions because of the insolvency of the employers, are attempting to clothe themselves with seamen's wage lien rights in order to collect certain sums from the vessel rather than her owners. No seaman is before this Court complaining that wages are owing to him. No assignments were given to Appellants by any such seamen since the seamen in question had received all wages due to them.

Appellants seem to be urging that by a right of subrogation they are entitled to assert the seamen's wage liens in place of the seamen. But it is axiomatic that the subrogee has no greater rights and remedies than the original creditor. 50 Am. Jur., Subrogation, §§110-112. It is conclusively established in this case that the seamen had no right to the employer's payments into the trust funds (T. 287:8-10; 290:8-13).

Appellees do not take issue with the proposition that one who advances money for crew's



"wages" gains the security of a lien for said sums. However, every case cited by Appellants in their opening brief, which has enforced a seaman's wage lien, was predicated upon the uncontroverted fact that monies were owing and payable directly to the seaman. These include fishing lays, statutory penalties for delayed payment, extra-hazardous duty pay, statutory extra pay for improper discharge, maintenance and cure, compensation for idle vessel, wages for broken or abandoned voyage, war bonuses, and discharge benefits.

No causes of action were vested in the seamen in our case. The seamen on the five vessels had no right to bring an action to force the employers to make contributions to the trusts. That right was vested solely in the trustees. That being the case, the contract underlying Appellants' action is the employer association/union contract which is nonmaritime in nature. No admiralty jurisdiction can arise from that contract.

The contracts here sued on are merely pre-





liminary to the contracts which give rise to a wage lien. As stated in Goumas v. Karras, 51 F. Supp. 145, 146 (S.D. N.Y, 1943), affirmed 140 F. 2d 157 (2 Cir. 1944):

A contract to work on the ship is of course maritime ... but not a contract to procure someone so to work.

And again in Westfall Larson & Co. v. Allman-Hubble Tug Boat Co., 73 F. 2d 200, 204 (9 Cir. 1934):

. . . Admiralty has jurisdiction over maritime contracts, but it has none over contracts leading up to the execution of maritime contracts. . .

(Quoting from United Transp. & L. Co. v. New York & Baltimore T. Line, 185 Fed. 386, 389-90 (2 Cir. 1911).

The preferred maritime lien created by 46 U.S.C. §953 (a) covers only maritime liens, The J. R. Hardee, 107 F. Supp. 379 (S.D. Tex. 1952), which are themselves debts for necessities created on the security of the ship to allow her





to continue her voyage. Piedmont Coal Co. v. Seaboard Fisheries, 254 U.S. 1, 9 (1920); The Rupert City, 213 Fed. 263, 267-268 (W.D. Wash. 1914); The Alcade, 132 Fed. 576, 578 (W.D. Wash. 1904).

The employer contributions here are not even maritime liens. The actual contract is between the man and the master of the ship, i.e., the shipping articles. The agreements between PMA and the Unions are preliminary to the actual agreement made by the seaman himself to work aboard a particular vessel and not a part of it. The Golden Sail, 197 F. Supp. 777, 779 (D. Ore. 1961).

While the dividing line between maritime and nonmaritime liens is not always sharply defined, there are some guiding principles. One of these guide lines is that preliminary agreements leading to a maritime contract are not maritime contracts themselves (and only maritime contracts can be enforced in admiralty). The rationale of this distinction is that it is capable of somewhat easy application and forms a readily discernible



dividing line, excluding from admiralty many types of claims which have a remote reference to navigation and commerce. The Thames, 10 Fed. 848 (S.D.N.Y. 1881); Cory Bros. & Co. v. United States, 51 F.2d 1010, 1012 (2 Cir. 1931); Marchessini v. Pacific Marine, 227 F. Supp. 17 (S.D.N.Y. 1964).

There is a further distinction applicable here - does the contract relate to the actual operation of a particular vessel? This we submit was the controlling factor in the Supreme Court's decision in Ward v. Thompson, 63 U.S. 330 (1859), wherein the Court ruled that a court of admiralty has no jurisdiction of a partnership agreement involving the operation of a vessel. The court stated (63 U.S. 330, at 333-334):

The only characteristics of a charter party to be found in this contract are that the subject of it is a ship and that libelants are owners. There is no letting or hiring of the ship to the respondent for a given voyage, to be em-





ployed by him for his own profit.

See also Economu v. Bates, 222 F. Supp. 988 (S.D.N.Y. 1963).

The collective bargaining agreements from which these trusts stem do not relate to any particular vessel, specific voyage or individual seaman, nor are they signed by the individual men or masters of the ships operated by the members of PMA. They are even more remote from the management and navigation of a vessel than the agreements classed as being nonmaritime contracts in the cases just cited.

It is necessary to point out at this juncture that the jurisdictional question did not arise in the cases relied on by Appellee in the remainder of this brief since the initial actions in those cases arose from preferred ship mortgage foreclosure proceedings which are maritime in nature.

- (2) It is judicially established that employer contributions to benefit plans of the type here involved are not maritime liens and are not entitled to status as "wages of the





crew of the vessel" within the meaning of 46 U.S.C. §953.

The Ship Mortgage Act of 1920, as amended, 46 U.S.C. §§911-984, was passed by Congress to give preferred ship mortgages maritime lien status and priority over all maritime liens other than those set forth in 46 U.S.C. §953. It is admitted in these proceedings that Appellees are the holders of preferred ship mortgages on the vessels in question and are entitled to assert the maritime lien rights attendant thereto. Concisely stated, Appellants' sole contention is that the payments due from the now defunct shipowners to the trustees of certain benefit plans fall within the meaning of "wages of the crew" as used in 46 U.S.C. §953, and accordingly, are entitled to priority over the mortgage liens of Appellees. Appellants' contention has been unanimously rejected by the reported cases.

The precise issue here involved has been the subject of litigation in a series of cases decided during the past six years. Each case has held that employer contributions to seamen's benefit



plans do not attain maritime lien status. See:

Brandon v. The Denton, 302 F.2d 404

(5 Cir. 1962), affirming 1960 A.M.C.

2264 (S.D. Texas 1960);

The Ozark, 304 F.2d 717 (5 Cir. 1962);

The Kingston, 1961 A.M.C. 1321 (S.D.

Texas 1961);

The Golden Sail, 197 F. Supp. 777 D.

Ore. 1961).

The Appellants would have this Court reject The Denton since it was premised (they say) on the ground that the lien for wages of the crew extends only to wages specified in shipping articles. Nothing could be further from the truth. It happened that in The Denton articles existed and the Court's remarks had to include that contingency. The case bears extensive comment.

In The Denton the Court reviewed the nature of the payments by the employers and the basic features of these plans, which for all practical purposes are the same as those in the case at bar, but distinguished these "contributions" from the





"wages of seamen" which the Court recognized as occupying a unique status and having historically been given high priority and even the most stringent, detailed and definite protections by Congress (See 46 U.S.C. §§541-646). The Court held that "wages of seamen" are the amounts named in the written shipping articles. 302 F.2d 404 at 416. Further, the Court noted that Congress had specifically provided for the situation where a seaman himself might give written consent for deductions for fringe benefit plans. 302 F.2d 404 at 416; 46 U.S.C. §599(g); Section (5), infra.

The Court in The Denton observed a number of distinctions between the actual wages of the men and the employer contributions. The following quotation amply demonstrates some of the differences observed (302 F.2d at 415-416):

The liability of the employer to the funds results from its agreement with the respective unions. Each of the agreements provides that the employer has a personal obligation en-





forceable by a "proceeding at law, in equity, or in bankruptcy." None make reference to proceedings in admiralty. The employer's payments are made directly to trustees who have complete control of the funds. There is nothing in any of the agreements to connect any particular money paid by the employer to a particular seaman on a particular vessel. No effort was made to provide for deductions from the wages of a seaman pursuant to his written consent as is permitted by 46 U.S. Code, Sec. 599(g) (Footnote omitted). Each plan provides that the payments by the employer may be used for the purpose of paying administrative costs of the operation of the plan. The plans are not set up separately for the T/S DENTON, but many employers make payments to a single plan. If one employer fails to pay, his default must be made good by the



other employers. A seaman receives his benefits regardless of whether his employer makes his payments to the plan.

The similarity of the findings in The Denton and the situation here presented is apparent. The Court also cited United States v. Embassy Restaurant, Inc., 359 U.S. 29 (1959), for purposes of comparison. 302 F.2d at 416.

The decision in The Denton became the rule in the Fifth Circuit and was dispositive of the identical issue in The Ozark, 304 F.2d 717 (5 Cir. 1962). In an earlier case in the Fifth Circuit, The Kingston, 1961 A.M.C. 1321 (S.D. Tex. 1961), a Commissioner's Report had reached the same conclusions, citing and applying the reasoning of the Supreme Court in United States v. Embassy Restaurant, Inc., supra, (1961 A.M.C. 1321, 1345-1347). A review of The Kingston is worthwhile, for the Commissioner went into various facets of these plans and demonstrated why employer contributions to plans of this type are so different from wages of seamen as contemplated by Congress





in 46 U.S.C. 953(a)(2). The Commissioner noted, inter alia, (1961 A.M.C. 1321, 1343-1345), that none of the employees contributed to the plans and that the amounts of the payments made by the companies were determined by the trustees. The men were paid benefits when eligible, even though the employer did not contribute to the fund in sufficient amounts, and contributions went into a general fund with no further identification as to the individual seaman. The seamen themselves did not sign the trust agreements (See Section 5, infra). The plans covered certain parties, such as masters, who have no maritime liens for wages, and under one plan, persons not part of the regular crew were beneficiaries (See Section 4, infra).

The Commissioner cogently stated (1961 A.M.C. 1321, 1344-1345):

In general, then, the various funds are created by contractual arrangement between the steamship companies and the unions as collective bargaining





agents. In fact, if no contributions are made to a fund, a man is still entitled to benefits, and some benefits paid out undoubtedly would have to come from the payment made to such funds by other companies. It is difficult to see how such general funds out of which are paid administration and operating expenses and in which seamen have no vested rights, have any relation to maritime liens. Rather the agreements give rise to rights that sound of in personam remedies against the various owners of the defunct steamship companies for delinquent payments based on contract.

In the Ninth Circuit the issue was squarely met by the District Court of Oregon in The Golden Sail, 197 F. Supp. 777 (D. Ore. 1961). Again it was held on fundamentally the same reasoning that was applied in The Denton and The Kingston that the employer contributions are not wages of seamen under 46 U.S.C. §953.



The Embassy Restaurant case, 359 U.S. 29, cited in The Kingston, supra, was also considered by the Court in The Golden Sail, supra, 197 F. Supp. at 778. While the Supreme Court case did not involve seamen's wages, it dealt with a similar problem: whether employer contributions to a union welfare fund were wages due to workmen entitled to priority under §64 (a)(2) of the Bankruptcy Act, 11 U.S.C. 104(a)(2). A reading of the case indicates that basically the same arguments raised by the trustees in this proceeding, and considered in the earlier cases just discussed, were raised in the Supreme Court. The Supreme Court concluded that these contributions were obligations of the employer to contribute sums to the trustees of the plan, not to its workmen, and were enforceable only by the trustees, who enjoyed sole title and exclusive management of the funds. 359 U.S. at 33.

The Supreme Court also made another observation that has equal validity in this proceeding. It pointed out that if the claims of trustees were to be treated on a par with wages in a case where the employers' assets were in-





sufficient, the workmen claiming actual unpaid wages would have to share with the welfare plan, thus reducing the workmen's recovery. 359 U.S. at 33-34. The same reasoning would apply in the case of priorities under the Ship Mortgage Act. Expanding the class given the priority in a case of insufficient proceeds in the Registry representing the vessel after her judicial sale would reduce the individual recoveries of the seamen.

The admiralty cases previously cited are, we submit, in point, dispositive of the issue, and fully accord with the Supreme Court's reasoning in the Embassy Restaurant case.

Appellant Trustees rely on United States v. Carter, 353 U.S. 210 (1957) in which the Court held that trustees of welfare trusts similar to those involved herein could recover against the surety for unpaid contributions due to the trust funds from the contractor under the contractor's payment bond given pursuant to the Miller Act, 49 Stat. 793; 40 U.S.C. §§270a-d (1964). However, the Court in Embassy





has clearly distinguished Carter, stating at 359 U.S. at 34-35:

Nor does the Carter case, *supra*, support the granting of a priority to these contributions. There we dealt with the Miller Act, which granted to every person furnishing labor or material the right to sue on the contractor's payment bond "for the sum or sums justly due him." The contractor defaulted and the trustees of a welfare fund similar to that involved here sued on the bond for recovery of contributions "justly due." Our opinion did not hold that contributions were part of "wages ... due to workmen." In fact we pointed out that the trust agreement provided that the contributions "shall not constitute or be deemed to be wages," *id.*, at 217. The Act having the broad protective purposes of securing all claims that are "justly due", we held that the trustees might recover. In short, though



the contributions were not wages, they were "justly due" as a claim within "the purposes of the Miller Act." Under the Bankruptcy Act, however, not all claims "justly due" have priority. They must be within a class, such as "wages ... due to workmen." The claims here are not. If this class is to be so enlarged, it must be done by the Congress.

As the Carter and Embassy cases read together make clear, the test is not whether the claims for the contributions are made on behalf of the employees, but whether the claims are of such a nature as to come within the protection of the seaman's lien for wages considered either in the traditional or statutory sense.

- (3) Collective bargaining for a mislabelled "wage package" does not give Appellants a seaman's lien for wages.

Appellants have urged that the fruit of employer/union collective bargaining in the maritime





field is a "wage package." The term "wage package" is the invention of Appellants for the purpose of this litigation. The proper designation, as expressed by witness J. Paul St. Sure, is "cost package" (R.T. 72:24; 74:7; 90:21; 93:6-11). The use of the term "package" at all is dictated by convenience and without any attempt to affect the various items included in it.

Frequent reference to the "wage package" has little relevance to this proceeding, for the problem is what the term "wages" has been construed to mean in maritime lien law, and in particular, under the Ship Mortgage Act. The fact that under some statutes [Davis-Bacon Act, 40 U.S.C. §267 a(b) and the Miller Act, 40 U.S.C. §270 b(a)] fringe benefits are taken into account in equalizing the compensation paid to state or federal workers with that of employees in private industry is not determinative of the issues before this Court. Even the characterization of fringe benefits under a general classification of wages by the Maritime Administration





was explained by Appellants' witness James S. Dawson, Jr., as "purely an administrative means of determining the amount of subsidy due and should not be construed to mean that such items are in fact wages." (Trust Ex. 4, pp. 6-7).

It cannot be denied that the "package" which Appellants emphasize contains different items, one of which is wages and another of which is fringe benefits. The question is whether the employers' contributions for fringe benefits enjoy the status of the former in maritime law. The cases say no. The trustees' attempt to attain wage lien status for employer contributions by analogizing them with wages is in direct violation of the principle established in the cases cited in Section (2), supra.

- (4) The trust funds include employer contributions for the benefit of masters and shoreside personnel, neither of whom can assert a seamen's wage lien.

It is admitted that the trust funds in question receive employer contributions for the



benefit of masters and certain shoreside personnel (T.277:25-31).

Without question, a master has no lien for wages. Steamboat Orleans v. Phoebus, 36 U.S. 175 (1837); Norton v. Switzer, 93 U.S. 355, 365 (1876); The Maret, 145 F.2d 431 (3 Cir. 1944); The Putnick, 291 Fed. 902 (W.D. Wash. 1923); United States v. The Pomare, 92 F. Supp. 185 (D. Hawaii 1950). Appellants do not urge, as indeed it would be preposterous to urge, that a shoreworker may have a "seaman's wage lien." Allowing the trustees to recover these employer contributions under the guise of "seamen's wages" would violate basic admiralty law.

- (5) If the employer contributions are held "seamen's wages", the applicability of 46 U.S.C. §599(g) would preclude Appellants' recovery on the grounds of illegality.

The provisions of 46 U.S.C. §599(g) are clear. No deductions or allotments may be made by the employer from the "wages of a seaman" unless the seaman expresses his written consent thereto. No such written consent was given by





any seamen involved in this case. Should the employer contributions be held "wages of seamen", it follows that all monies poured into the trusts over the years have been illegal payments. Appellee does not so urge. On the contrary, since the employer contributions are not "wages of seamen", the funds were legally collected by the trusts.

This fact is especially important when it is realized that four of the trusts here involved have provisions for "employee contributions" based upon the personal signature of the employee. It is fair to say that signatures were disregarded in the case of the employer contributions since the trusts initially did not regard these employer contributions as "wages of seamen".

(6) Any alteration of the existing  
statutory maritime lien law should  
be left to the Congress.

As pointed out in Section (2), supra, the Ship Mortgage Act of 1920 was enacted to give investors in the merchant marine a high degree





of security on their investments. The preferred ship mortgage lien was given priority over all maritime liens other than those enumerated in 46 U.S. C. §953. Without question Appellees hold preferred ship mortgage maritime liens.

Appellants here urge that employer contributions to trust funds are "wages of the crew" and entitled to the priority described in the statute. There is absolutely no precedent for extending "wages of the crew" as used in the statute to include employer contributions of the type here involved.

"Wages of the crew" are entitled to a priority because they must be paid to keep the ship in operation and, for that reason, benefit even the mortgagee. If wages are withheld from the crew, the ship will undoubtedly be forced to stop operating and the mortgagee will be apprised of the situation in time to take whatever legal steps are necessary. Allowing the ship to incur wage liens under the guise of employer contributions to benefit plans will make the ship a float-



ing credit card in this respect, all to the detriment of the mortgagee whom Congress intended to protect. Any liberalization of the statutory preferred maritime lien should be undertaken only in the most warranted of situations or by the Congress.

### CONCLUSION

The attempt by Appellant Trustees to classify their claims for employer contributions as seamen's wage liens must fail because:

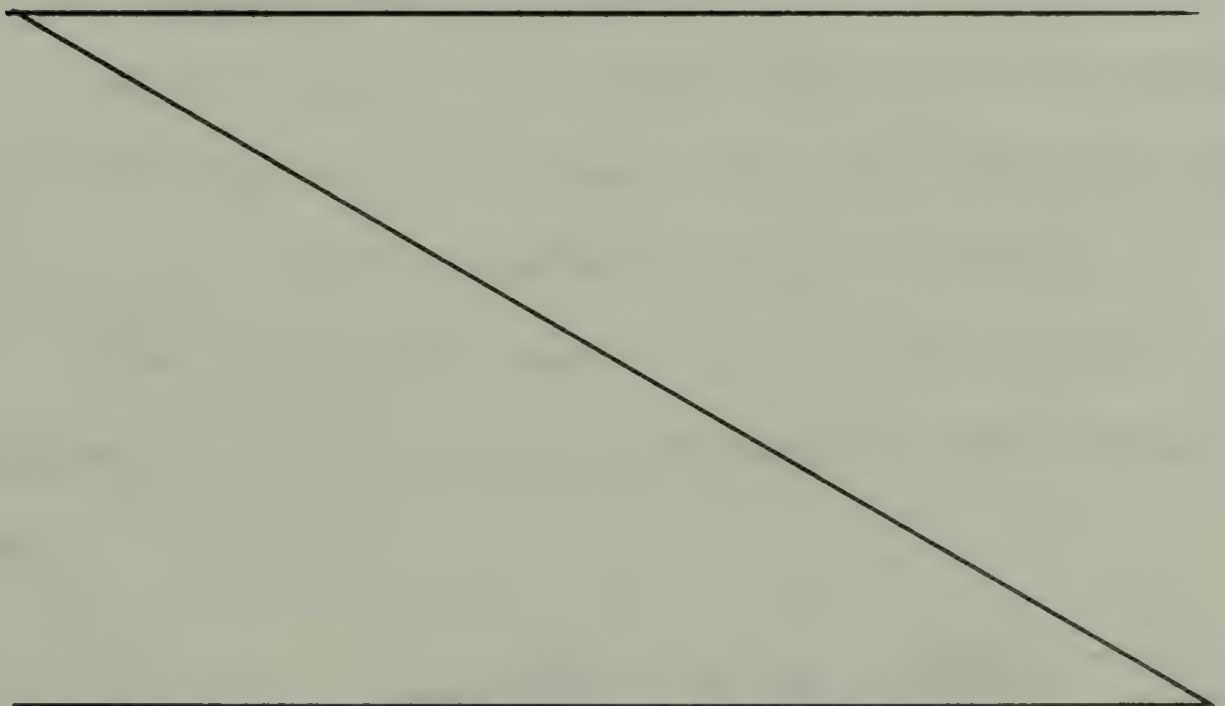
- (1) The underlying contract on which Appellants' claims rest is the steamship association/union agreement and not a maritime contract giving rise to jurisdiction in this case.
- (2) The existing law on the subject is unanimous in denying wage lien status to such claims by trustees.
- (3) The Trustees' claims lack identity with the seamen and the ships so as to fail as in rem rights. If anything, they are in personam obligations of the operators of the vessels and not maritime liens





at all, much less "preferred" maritime liens.

- (4) The trust agreements expressly state that the employer contributions are not to be considered as "wages of seamen".
- (5) The trust fund corpus includes payments made on behalf of masters and shore-side personnel, none of whom could assert a "seaman's wage lien."
- (6) The employer contributions cannot be held as seamen's wages without the trusts having violated 46 U.S.C. §599(g).





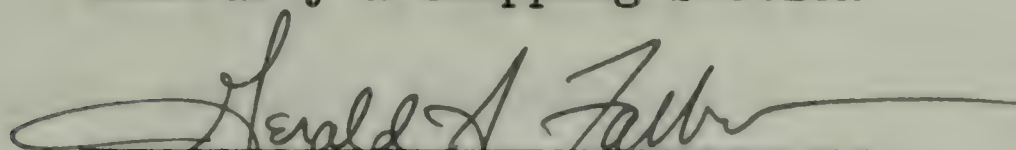


(7) Any change in the existing statutory law should be made by the Congress.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and in my opinion the foregoing brief is in full compliance with those rules.

  
GERALD A. FALBO, Attorney



CERTIFICATE OF SERVICE

I, Gerald A. Falbo, attorney for Appellee United States of America, certify that on this date I served copies of the foregoing Brief of Appellee United States as indicated below on Appellants John A. Cross, et al., and Appellees Pacific Far East Lines, Inc., by inserting said copies in an envelope, properly stamped and deposited in the United States Post Office, and addressed to:

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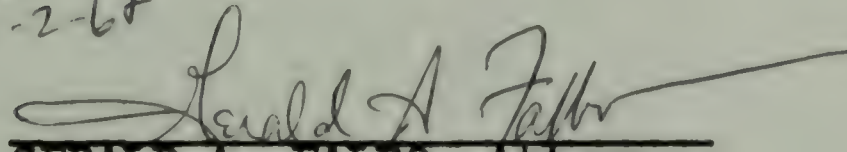




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Subscribed and sworn to before  
me this 2<sup>nd</sup> day of May 1968.

C. C. EVENSEN

Deputy Clerk, U. S. District Court  
Northern District of California





No. 21719, 21719A, 21719B, 21719C, 21719D

In the

United States Court of Appeals  
For the Ninth Circuit

JOHN A. CROSS, et al.,

vs.

*Appellants,*

No. 21719

S.S. KAIMANA, her engines, etc., et al.,

*Appellees.*

JOHN A. CROSS, et al.,

vs.

*Appellants,*

No. 21719A

S.S. LANAKILA, her engines, etc., et al.,

*Appellees.*

JOHN A. CROSS, et al.,

vs.

*Appellants,*

No. 21719B

S.S. ALASKA BEAR, her engines, etc., et al.,

*Appellees.*

JOHN A. CROSS, et al.,

vs.

*Appellants,*

No. 21719C

S.S. PACIFIC BEAR, her engines, etc., et al.,

*Appellees.*

JOHN A. CROSS, et al.,

vs.

*Appellants,*

No. 21719D

S.S. COAST PROGRESS, her engines, etc., et al.,

*Appellees.*

Reply Brief of Appellants

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In the  
United States Court of Appeals  
For the Ninth Circuit

JOHN A. CROSS, et al., vs.	<i>Appellants,</i>	No. 21719
S.S. KAIMANA, her engines, etc., et al.,	<i>Appellees.</i>	
JOHN A. CROSS, et al., vs.	<i>Appellants,</i>	No. 21719A
S.S. LANAKILA, her engines, etc., et al.,	<i>Appellees.</i>	
JOHN A. CROSS, et al., vs.	<i>Appellants,</i>	No. 21719B
S.S. ALASKA BEAR, her engines, etc., et al.,	<i>Appellees.</i>	
JOHN A. CROSS, et al., vs.	<i>Appellants,</i>	No. 21719C
S.S. PACIFIC BEAR, her engines, etc., et al.,	<i>Appellees.</i>	
JOHN A. CROSS, et al., vs.	<i>Appellants,</i>	No. 21719D
S.S. COAST PROGRESS, her engines, etc., et al.,	<i>Appellees.</i>	

Reply Brief of Appellants

Appellants assert that the sums they seek to collect are sums advanced as elements of the agreed compensation for maritime services rendered by crew members of the libeled vessels and so are

enforceable against these vessels through the maritime lien for seamen's wages. As we pointed out in our opening brief (Op. Br. 34-43), the court below accepted our basic arguments as to the admiralty law and then erroneously distinguished them. We shall now briefly restate our arguments and summarize the response of respondents before taking up this response in detail.

Appellants rely on the seamen's contracts. Appellants' claims are based upon the non-performance of wage obligations in the employment contract between the operators of the libeled vessels and the crew members who performed maritime services aboard them. By each such contract, the libeled vessel's operator agreed to provide each crew member with fractional rights to vacation, fractional rights to pensions, and fractional rights to welfare coverage for each day of maritime services. To provide the seamen these fractional rights, the vessel operator agreed to pay their value to the trusts. The individual contracts further provided that these rights can be accumulated so that each seaman can actually collect the three types of deferred compensation in accordance with the plans that have been agreed upon through collective bargaining and incorporated into the seamen's individual employment contracts.

The claims of appellants are based upon the existence of these contracts of employment between each crew member and the vessel operator, the performance of maritime services under these contracts, the failure of the vessel or the vessel operator to pay these agreed wages by providing these fractional rights, and the provision of these rights by the trusts, which were set up by the seamen as conduits for collecting on these rights. These rights were provided by the trusts by their advancing credit to the vessel in reliance on the lien for wages, by accepting as valid and enforceable the fractional rights earned by the men for their work on the libeled vessels. Each trust now sues to recover the moneys advanced to the crew members for this portion of the wages of each for maritime services on the libeled vessels.

*In reply respondents make two principal contentions as well as several subsidiary claims.* First, respondents contend that the

trusts cannot sue in admiralty and there is no maritime lien for wages because each suit seeks to collect "Employer Contributions" due under a collective bargaining contract obligation of the vessel operator to the trust. Second, respondents contend that the performance of maritime services creates no lien securing the payment of these "Employer Contributions" because the deferred compensation, which was agreed to be paid for the maritime services, is not paid in cash immediately after the services are performed. They add that there are actuarial considerations and contract conditions that affect the exact amount of the deferred cash collected later on through the multi-employer—multi-seamen trusts established to channel their compensation to the seamen.

### REPLY ARGUMENT

#### 1. Admiralty jurisdiction embraces the claim presented by appellants.

Respondents' attack on admiralty jurisdiction, like other arguments they make, depends upon their establishing that each of appellants' claims is no more than a demand for "Employer Contributions" that a collective bargaining agreement obligates the vessel operator to pay to the trust. However, in the seventy five claims here each trust relies on obligations from the vessel's operator to the several seamen under each one's own contract of employment. (See 4-5, *infra*). The seaman worked under it on the vessel. Its operator, as a result, incurred an obligation to the seaman. This maritime obligation has not been met.

A seaman can collect his cash wages in admiralty. He is entitled to collect in admiralty although his claim refers to the collective bargaining agreement to provide the measure of his compensation in his individual contract for the performance of maritime services. *Lakos v. Saliaris, The Leonidas*, 116 F.2d 440 (4 Cir. 1940); *Glandzis v. Callinicos*, 140 F.2d 111 (2 Cir. 1944). He can proceed *in rem* for these wages.

The trusts proceed on the same basis. Appellants have shown that maritime services were performed, that there was an agreed



consideration for these services in a maritime contract, that a portion of the consideration was not paid by the vessel operator, and that the trusts provided these portions of the agreed wages. These facts establish that the trusts are entitled to enforce the maritime lien that is security for these wages. Such a claim is within admiralty jurisdiction.

**2. Respondents' arguments do not relate to the admiralty obligations, the maritime facts, and the admiralty remedies relied upon by appellants.**

The irrelevance of respondents' arguments is disclosed by consideration of these arguments in relation to the facts, their legal consequences and the arguments of appellants.

**(a) Respondents ignore the individual contracts.**

Respondents' fundamental mistake of admiralty and labor law is stated in the brief of the United States (p. 14):

"The actual contract is between the man and the master of the ship, i.e., the shipping articles. The agreements between PMA and the Unions are preliminary to the actual agreement made by the seaman himself to work aboard a particular vessel and not a part of it."

This is not correct.

When a seaman joins a vessel to go to sea, he makes an individual contract that includes the terms in the articles, *if there are any*. (See Op. Br. 7-9). In addition it includes, as well as the terms implied from statutes, the full "wage package" provisions of the collective bargaining agreement. (The terseness of the articles is discussed at 15, *infra*.)

The collective bargaining agreement terms become part of the contract between the seaman and the vessel operator. That agreement sets forth the "wage package" terms under which seamen offer to go to sea; it also sets forth the "wage package" terms under which vessels offer employment aboard ship. Hence, when the seaman accepts the offer of the employer or the employer accepts the offer of the seaman, an individual employment contract is consummated that includes a promise to perform maritime serv-

ices and a reciprocal promise to pay the compensation specified in the collective bargaining agreement.

Respondents seem to urge that no lien applies to the wage payments that the operators of the libeled vessels failed to pay on the theory the seaman cannot sue for these sums. But he has rights on which he can sue. The seaman would not have worked unless his employer promised him valid, enforceable, indefeasible rights to deferred compensation. The employer made this promise to the seaman. When services were performed under the contract, the consideration specified in the collective bargaining agreement was payable for them. Hence there is a contractual obligation to the seaman that the specified moneys be paid into the plan and that he have fractional rights on which he can rely when he seeks to collect from the plans, without having to hope that the trusts will give credit on the strength of the lien for wages. The seaman can sue to enforce this obligation.<sup>1</sup>

**(b) On the credit of the vessel, the trusts advanced wages for the vessel operator to meet the rights of its seamen.**

Coastwise Line and Dorama were each liable to pay to the trusts the value of the fractional rights its seamen earned. Although these debts were not paid, the trusts advanced wages to the seamen of their vessels by giving them full credit for the fractional rights they earned. The seamen thus got exactly what they were promised by the vessel operator.<sup>2</sup> But the debts of Coastwise and Dorama have not been discharged.

The credits were advanced in reliance on the lien. There was no basis to expect that other employers would pay the

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1. In addition, he holds rights to collect the sums due under the plans. These also can be enforced by litigation, subject of course to the usual requirement in a collective bargaining agreement, of exhausting the contractual administrative remedies. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Humphrey v. Moore*, 375 U.S. 335, reh. den. 376 U.S. 935 (1964); *General Drivers v. Riss and Company, Inc.*, 372 U.S. 517 (1963); *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711 (1945).

2. The fractional right is equal, in money value, to the amount of the employer contribution that was to have been paid (see Op. Br. 14-15, 33-34). Hence the trusts advanced value equal to the contributions due.



contributions of Dorama and Coastwise, for the plan documents state:

"Neither the Association nor any Contributing Employer shall be liable . . . for contributions due from any other Contributing Employer. . . ." (see Op. Br. App. 11-22).

The basis for the action of the trustees in advancing the paid-up value of these rights is set forth in the 1958 language of one of the deferred compensation contracts, reading:

"If a Contributing Employer is delinquent or default in payment of contributions, *the lien against the ship for seamen's wages shall be available* to the Trustee and if suit is brought to recover such contributions, interest thereon shall be payable at the rate of 7%, and all costs of collecting such delinquent or defaulted contributions, including a reasonable attorney's fee, shall be paid by the Contributing Employer".<sup>3</sup> (Emphasis added). (See Reply Br. App. ¶¶ 38, 49).

(c) The cases relied upon by the respondents emphasize their failure to meet the admiralty law principles relied upon by appellants.

Respondents cite many opinions not involving maritime services or individual employment contracts for such services. *Goumas v. Karras & Son*, 51 F. Supp. 145 (S.D.N.Y. 1943), *aff'd*, 140 F.2d 157 (2 Cir. 1944), involved a contract to provide seamen. The seamen provided to the ship refused to work on it because it was uninhabitable. No maritime services were performed. No individual contract was made for performing such services. *Marchesini & Co. v. Pacific Marine Corporation*, 227 F.Supp. 17, 1964 A.M.C. 1538 (S.D.N.Y. 1964), holds that an agreement to husband vessels, to solicit cargo and to collect freight is a non-maritime contract because it does not cover the navigation and management of any vessel. This case does not apply here because the services

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3. This language was adopted in 1958 at the time the agreements were changed to require the employers to pay the contributions necessary to support the agreed level of benefits. (*cf.* Vessels' Exhibit G, para. 16, 19 and 21).



performed here are analogous to the navigation of the vessel, the missing element there. *The Josephine & Mary*, 120 F.2d 459 (1 Cir. 1941), involved a suit by a seaman to enforce a personal injury settlement agreement. This was not a contract calling for maritime services. None were performed under the settlement agreement. It was a non-maritime contract setting forth a new obligation of the vessel operator in lieu of one that had previously accrued.

One key to the differences between the cases relied upon by respondents and the situation presented by appellants is indicated by the language in the brief of the United States (pp. 13-14) stating that the senior maritime liens, under 46 U.S.C. § 953, cover only "debts for necessities created on the security of the ship to allow her to continue her voyage".<sup>4</sup> The three cases discussed immediately above do not involve "debts for necessities . . . to allow [the ship] to continue her voyage". The same is true of the other cases relied on by respondents, including *Ward v. Thompson*, 22 How. (63 U.S.) 330 (1859). It holds that a partnership agreement among partners operating a vessel is not within the admiralty jurisdiction, although a charter party for the hiring of a ship for a given voyage is clearly within such jurisdiction. While such cases involving contracts having "a remote reference to navigation and commerce" are outside of the admiralty jurisdiction (compare U. S. brief, 12-16; PFEL brief, 14-16), they have no relevance to the present issues involving obligations for maritime services under seamen's employment contracts.

*Respondents also rely on a line of cases dealing with obligations in collective bargaining agreements to pay "Employer Contributions" into deferred compensation plans.* These opinions specifically state they were not based on the individual contracts. Thus *The Golden Sail*, 197 F.Supp. 777 (D. C. Ore. 1961), states at 779 that the action there was a "claim under the union bargaining agreement". The lower court opinion in *The Denton*, 1960 A.M.C. 2264 (D.C.S.D. Texas, 1960), states that the proceeding was to enforce the collective bargaining agreement. The same is

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4. One reason why ship mortgage liens are junior to these other liens is that they are not so limited in scope.

said in *The Kingston*, 1961 A.M.C. 1321 (D.C.S.D. Texas, 1961), and in the Fifth Circuit opinions in *Brandon v. The Denton*, 302 F.2d 404 (5 Cir. 1962), and in *The Ozark* (by citation), 304 F.2d 717, 720 (5 Cir. 1962).<sup>5</sup>

(d) Respondents' proposed new rule, to limit the lien to wages similar to those stated in the articles, should not be adopted.

The Fifth Circuit's opinion in *Brandon v. The Denton*, 302 F.2d 404 (5 Cir. 1962) states that the maritime lien for wages is limited to the wages specified in the shipping articles. This is also stated in the opinion in *The Golden Sail*, 197 F.Supp. 777 (D. C. Oregon, 1961).<sup>6</sup> Respondents, however, recognize that this contravenes admiralty law and so offer a new proposition. They propose that the lien shall apply only to "the *kind* of payments dealt with in shipping articles, viz., payments which the workers receive directly to use as they wish and are entitled to sue for if necessary" (PFEL brief, p. 17).

None of the opinions constituting the "numerical weight" relied on by respondents (see PFEL brief, pp 12-16) is based upon this legal reasoning. All are based upon other legal theories, every one of which our briefs show to be without validity (Op. Br. 19-41; supra 7-8). Accordingly, when respondents urge that these decisions should be followed because of a reason not set forth in the opinions, they admit there is no admiralty precedent supporting their position. The Court, we submit, should follow the logic and thrust of the admiralty law appellants have presented (Op. Br. 17-28) and reject respondents' suggestion that it adopt a novel principle derived from cases wrongly decided on inapplicable or erroneous admiralty theories.

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5. The two Texas district court commissioner opinions also indicate that these agreements were held to include a specific negation of admiralty jurisdiction (1960 A.M.C. 2279; 1961 A.M.C. 1345).

6. The district court added, 197 F.Supp. at 779, that there is an "essential difference between union bargaining agreements of workers ashore and the signing of ship's articles between the seamen and the master of the vessel for the voyage, which is governed by 'shipment of the crew'", referring to c. 18 of 46 U.S.C., §§ 561-591.



(e) **The bankruptcy precedents are not applicable.**

Our opening brief disposes of the arguments that bankruptcy law precedents, involving a policy unique to the bankruptcy laws, are governing in admiralty. (Op. Br. 41-43).

Nothing is added by *Joint Industry Board of the Electrical Industry v. United States*, ..... U.S. ...., 20 L. ed. 2d 546 (May 20, 1968). The 1968 opinion calls attention to the unusual character of the bankruptcy policy involved, and so confirms its inapplicability in admiralty. Thus the Court's majority opinion repeats that the bankruptcy law gives a certain priority to some of the "wages . . . due to workmen" in order to give the workmen temporary relief from the unemployment expected to arise as a result of the bankruptcy of their employer. In contrast, the admiralty policy is that each seaman shall be paid *every portion of his wages* due for his performance of maritime services before any other person can collect against the security that the vessel provides for payment of these wages and certain other debts (see Op. Br. 41-43).<sup>7</sup> The admiralty liens have developed as a means of assuring that vessels proceeding all over the world can be held liable anywhere for the debts necessary to permit the vessel to continue on its voyage. The lien for wages means that the seaman does not have to seek the employer, to find him wherever he may be throughout the world, in order to get any of his wages. The lien is to see to it that every seaman gets all of the wages that are "justly due" to him because they are called for under his contract of employment. It is for this reason that appellants properly rely upon *United States v. Carter*, 353 U. S. 210 (1957).

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7. We also point out that the bankruptcy statute and precedents cited relate to the distribution of those assets of a bankrupt that do not secure specific debts; in contrast the admiralty issue has to do with defining the debts secured by a specific asset of an owner who may be entirely solvent.

In addition to these differences in policy, there is a significant difference in language. There is no logical basis for saying that the bankruptcy phrase quoted, used in defining a preference, means the same as the word "wages" when used without the restricting language in the phrase, particularly where the word is used descriptively only to provide a reference to one of the maritime liens (Also compare 14-16, *infra*).



(f) The existence of other non-admiralty obligations and other non-admiralty remedies is of no significance.

There are several obligations calling for payment of the amount here claimed. We have outlined the obligation calling for payment to each trust of the value of the wages advanced by the trust. There is another maritime contract obligation - in the individual employment contracts appellants rely upon - running to the individual seaman and requiring payment of "Employer Contributions". Further, the employer has an obligation under the collective bargaining agreement, when services are performed, to pay the "Employer Contributions" and the other elements of the seamen's wages. Finally, the vessel operator may also be under an obligation in a contract among all of the employers under which each agrees with the other employers that it will pay the contributions into each plan in order to make it effective.

The value of the wages (fractional rights) advanced by the trusts equals these contributions (see Op. Br. 14, 33-34, 37-38). Hence, the payment to the trusts of the amount here claimed will satisfy and extinguish all these obligations. However, the trusts are free to choose to proceed on those enforceable *in rem* in admiralty.

Respondents' *in rem* rights are not destroyed because there are *in personam* remedies to collect the amounts here sought. The same *in personam* remedies lie to collect in a non-admiralty court, or in admiralty, the amount of other items of wages of the seaman should he prefer to proceed in a state court or in the federal court without libeling the vessel. So too, there is ordinarily an *in personam* right to proceed on the underlying note to collect in a non-admiralty court the amount of a debt secured by a ship's mortgage.<sup>8</sup> The availability of these remedies to enforce these other obligations in no way precludes use of the *in rem* proceeding in admiralty to enforce the maritime lien securing the admiralty obligation. The availability of the comparable *in personam*

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8. The mortgage documents specifically so provide (C.T. 8-N, § 1(2); Reply Br. App. ¶ 14).

remedies in no way defeats, or reduces in scope or significance, the obligation, the lien or the remedy relied on by the trusts.<sup>9</sup>

Similarly, it is not important that there is security in addition to the lien. By getting other employers to agree to keep full the pots out of which the benefits are paid,<sup>10</sup> the unions have been able to negotiate a second type of security to assure crew members that they can translate their fractional rights into "take-home" vacation pay, pensions and welfare. The availability of other security does not defeat this lien. See, e. g. *Brock v. S.S. Southhampton*, 231 F.Supp, 280 (D. Ore. 1964).

In *The Southhampton*, the Israel bank entered into an agreement with the unions representing the seamen and the vessel's owner under which the bank agreed to provide money to meet the wages due to members of the crew of the Southhampton and the bank received guarantees of reimbursement from the owner, plus certain other security. It did so in the form of a letter of credit. Drawings were made against the letter of credit, the proceeds being used to pay wages due to the seamen of the Southhampton. The bank thereafter libeled the Southhampton for the amounts advanced. It collected on the ground that it had advanced the wages in reliance on the credit of the vessel, as well as on the credit of the owner and on the other security provided to protect the bank. The court stated, 231 F. Supp. 282:

"Under the maritime theory of advancement, one who pays the claim of the maritime lienor is entitled to the rights previously acquired by the lienor. \* \* \*

"[The bank] issued its letter of credit, not to the owner, but to an agent of the crew, to assure payment of crews' wages and other compensation as these obligations arose. In fact, the letter of credit was drawn on, and wages and compensation paid, only after they were earned. Israel claims only the amounts paid to crew members of the SS Southhampton."

Here each of the appellant trusts had an agreement with the union representing the seamen and with the operator of each of the libeled vessels (the plan documents and the Dorama non-member participating agreement) under which the trusts agreed

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9. Compare *Smith v. Evening News Association*, 371 U.S. 195 (1962).

10. At this time there was also agreement that the lien for wages secured the payment of the money due into the trusts. See n. 3, *supra*.



to accept and recognize the fractional rights - so that the crew members of the vessel would receive, and could collect on, the consideration due to them for their performance of maritime services on the vessel - and the trusts received guarantees of payment of contributions from the ship operator and had other security in the lien for wages. The employer failed to make the payments necessary to satisfy its fractional rights obligation to the crew members earned as part of the compensation for their work on the vessels. The trusts nevertheless gave validated fractional rights, relying like the bank on the security of the vessel. As they advanced the agreed wages and seek their value, the trusts should collect *in rem* in admiralty.

**3. The characteristics of deferred compensation do not extinguish the lien for wages or preclude its existence or enforcement.**

Respondents urge that the lien for wages is not enforceable because the deferred compensation is received in some form other than immediate cash payments to be used as the seaman wishes at the end of the voyage. The seamen chose to take some of their total compensation for services, i.e. the "wage package",<sup>11</sup> in vacation pay, pensions and welfare coverage. The cost to the vessel operator would have been the same, however, had the seamen chose to allocate their "wage package" differently. The decision to collect some of their compensation in these deferred forms is socially sound, is encouraged by the tax laws, and is part of the realities of today's labor relations ashore and afloat (See Reply Br. App. ¶¶ 17-24; 62; Vessels' Exhibit D).

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11. The United States (p. 28) asserts that the term "wage package" is the invention of appellants for the purpose of this litigation. It is used by the Supreme Court in *United States v. Embassy Restaurant*, 359 U.S. 29 at 33 (1959). See also Reply Br. App. ¶ 24.



(a) Respondents' technical objections to enforcing the lien are groundless because the trusts advanced to the seamen the exact wages they earned.

Respondents' arguments with respect to advances, assignments and subrogation (see PFEL brief 17-21; U.S. brief 11-12) are without merit because (See 4-5, *supra*) the trusts provided the seamen with the precise wages they earned. It is unimportant that the crew member can proceed legally only to collect the products of his accumulation of fractional rights. It is not important that the money paid in by the individual operator is in direct proportion to the work done by the individual crew member, while the benefits received at later dates are not in this direct proportion (PFEL brief, 8, 17; U.S. brief 22) or that the contributions measured by the seaman's employment on a vessel are not kept in a separate account for his exclusive use (PFEL brief 18; U.S. brief 22) or that they are not available to the seaman in place of his fractional rights (PFEL brief 7, 17; U.S. brief 7). The foregoing, necessary or common to multi-employer—multi-employe plans, are not important because the contract provided that the deferred compensation part, of the agreed consideration for the maritime work on the vessel, was to be the fractional rights to collect benefits in this way.

Similarly, it is unimportant that the contributions go into a general fund while the fractional rights are credited to the seaman. Although the dollars paid in lost their identity in the fund, the credits were clearly earmarked for each man when they were accepted by the appropriate trust. This action gave the seaman what he had coming as to his "specific, identifiable, then due wage claims" against the vessel and its operators.

**(b) The lien is not to be denied because the seamen on the libeled vessels collected their benefits.**

Respondents base much of their argument on the asserted facts that the seamen here were entitled to collect the agreed-upon fruits of their fractional rights even though the vessel operator failed to pay their value into the trusts. The scope of the lien for wages cannot be based on such facts. Trusts cannot, as a practical matter, advance vacation pay, pensions and welfare coverage unless they can rely on the security of the lien for wages.<sup>12</sup>

The seamen will lose if the trusts cannot enforce the lien; any lack of funds in a plan leads eventually to less benefits to some seamen at some time. What is more, the fractional rights for Dorama employment were defeasible when earned. The contract clauses so state.<sup>13</sup> In the absence of the contributions equal to their value, they became indefeasible only when the benefits based on them were collected or they were otherwise "accepted" finally by the trusts. To give full protection to the seaman, the lien for his wages must be enforced here.

**(c) The enforcement of the maritime lien as security available to the trusts does not involve any violation of 46 U.S.C. § 599(g).**

Respondents' reliance on 46 U.S.C., c. 18, § 599(g) is misplaced. Their major premise is that the word "wages" has the same meaning in c. 18 as in 46 U.S.C., c. 25, § 953(a). This is a false premise. The word "wages" does not have a uniform meaning.<sup>14</sup>

Chapter 18 of 46 U.S.C., which includes § 599, sets forth a variety of provisions relating to the employment and pay of seamen. Among these provisions is 46 U.S.C. § 564, which requires

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12. The lien attaches when the work is done; it is extinguished only when the money due is paid by the vessels' representative. The existence of additional security does not prevent attachment of the lien. Payment by one advancing money on the credit of the vessel does not extinguish the lien (Op. Br. 26-28).

13. Reply Br. App. ¶¶ 33, 34, 35, 40, 41, 47, 50.

14. This is not only because c. 18 uses the word to define the scope of its substantive provisions while it is used in c. 25 merely descriptively to refer to the body of judge-made admiralty law as to the lien securing the payment of all of the seamen's compensation. The more significant reasoning is set out in the body immediately below.



that "the amount of wages which each seaman is to receive" shall be contained in the shipping articles. This provision is satisfied by setting forth only the *base wages* that each seaman is to receive. These are the only wages contained in the shipping articles in the record.<sup>14a</sup> This is the uniform practice although base wages are by no means the total compensation now received by seamen. Section 564 has never been construed to require that the articles contain the amounts of wages paid as overtime pay, penalty pay, penalty cargo bonuses, nonwatchstanding allowances, war bonuses, attack bonuses, maintenance and cure, repatriation, unearned wages, etc. Nevertheless, all these multitudinous facets of seamen's wages are protected by the lien for wages of the crew of the vessel (Op. Br. 19-22). In short, the term "wages" in 46 U.S.C., c. 18, § 564, does not encompass all of the "wages" that are protected by the traditional lien for wages of the members of the crew. No more does the term "wages" as used in § 599 of the same chapter.

The error of respondents is further shown by the fact that the word "wages" has a variety of meanings in different legal contexts. For example, the Internal Revenue Code has elaborate, lengthy definitions of the word "wages", adopted at different times, 26 U.S.C. §§ 3121(a) and 3404(a), etc.<sup>15</sup>

The legislative history of sub-section (g) of § 599 confirms that payment of the contribution is lawful. Congress, in enacting sub-section (g), accepted the testimony that deferred compensation plans could certainly be lawfully financed by any deduction from the wages of seamen, with the possible exception of deductions taken from tax-paid wages of nonmembers of the participating union.<sup>16</sup> This testimony cites provisions in the Labor Management

---

14a. These articles (Vessel Exhibit 2-A) were duly witnessed by the deputy shipping commissioner of the Coast Guard, the agency that is required by 46 U.S.C. § 565 to witness the execution of all shipping articles.

15. The trust documents state that the contributions are not "wages" for tax purposes. Respondents are in error in giving greater significance to these clauses. Their true meaning is shown by the paragraphs quoted in Reply Br. App. ¶¶ 30, 31, 36, 39, 44; etc.

16. The legislative history set forth in Vessel's Exhibit C-2 is summarized, with excerpts and explanations, in Reply Br. App. ¶¶ 55-61.



Relations Act, 29 U.S.C. §§ 141-187. In short, the validity of these deductions under the labor relations legislation is controlling.<sup>17</sup> There is no merit in respondent's assertion that collection of the sums claimed by the trusts is illegal under 46 U.S.C. § 599(g) if they are seamen's "wages" secured by the maritime lien.

**4. The ranking and scope of the lien created by the Ship Mortgage Act of 1920 is not invaded by giving the superior lien for wages of members of the crew of the vessel its full scope to provide security for all elements of the compensation of members of the crew.**

A full answer to any claim that the Ship Mortgage Act of 1920 would be contravened by sustaining the position of appellants is that the law was enacted without the least effect, or purpose, of minimizing or restricting the scope of the lien for wages of the crew of the vessel. The ship mortgage was not given a preference over some types of seamen's compensation. Congress did not intend, or act, to narrow the lien for wages of crew members. By 1920 the history of the lien for wages had established that it applied to newly developed forms of wages, and without regard to what was stated in shipping articles. (Op. Br. 19-25) The creation of a new maritime lien, junior to that for wages, cannot of itself restrict the senior lien; the Congressional failure to express any limit on the senior lien shows that it retains its historic character.

To give the full effect of this lien for wages is not to extend one of the "secret" maritime liens by contruction, analogy, or inference (as implied at page 10 of PFEL's brief). Respondents cite no case to indicate that the quoted principle has ever been used to exclude any part of the seaman's compensation from the security of the lien for wages. We are confident there is no acceptable authority to this effect.

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17. See Reply Br. App. ¶¶ 17-24; 55-61.

Furthermore, and in any event, the union members all gave their consents to all the deductions by their union's written execution of the agreement requiring the deductions. The only possible question is with respect to the unheard-of seaman who is not bound by his union's action (see Reply Br. App. ¶ 61). The possible technical problem as to his deductions from his taxable wages was the subject of (g).

One relying on a ship mortgage is in a situation much different from that of one relying upon a mortgage on shoreside real estate or on chattels. The ship mortgagee does not have the first lien. As the United States states (brief at 32):

“ ‘Wages of the crew’ are entitled to a priority because they must be paid to keep the ship in operation and, for that reason, benefit even the mortgagee.”

Of the same character are the other preferred admiralty liens, which may attach anywhere in the world, as security for longshore wages, for tort damages for injuries to individuals or to other vessels or to maritime installations, for repairs, for general average, for salvage.

To protect the mortgage lien against these senior liens, the mortgagee must use safeguards and police the mortgagor. Sellers of ships, lenders and insurers of ship mortgages - such as PFEL and the United States - have the legal and economic power to police their loans and security. They normally take detailed steps to make this policing easy and effective. The mortgage papers in the present record show detailed safeguards and precise policing tools. These are gathered in the Reply Br. App., ¶¶ 1-16. Their failure to protect their security does not permit them to shift their loss at the expense of the senior lien.<sup>18</sup>

---

18. To the extent that the specific facts as to “secret” action are material, they support appellants. The language quoted above (at 6), specifically recognizing the availability of the wage lien to secure delinquent contributions, was in an agreement executed on October 1, 1958, shortly before the delinquencies here at issue started to develop. It was signed individually by PFEL by its agent for this purpose, T. E. Cuffe, who also was a trustee. He also signed the documents of a number of the plans, see Reply Br. App. ¶¶ 43, 45, 46, 52, 54. 1958 documents recognizing the availability of the lien, with signatures of T. E. Cuffe for PFEL are printed in the Reply Br. App. ¶¶ 38-42; 49-51. Furthermore, PFEL was the California agent of Coastwise Line (C.T. 27:22-27). The United States also had knowledge of the financial condition of the vessel operators. Late in 1959 (C.T. 825:17-18; 832:22-833:2), and again late in 1960 (C.T. 625:20-32; 633:4-15), while delinquencies existed, the United States agreed to a moratorium on the payments due under the note secured by the ship mortgages on the Coast Progress. Payments of \$436,080 were postponed. See Reply Br. App. ¶¶ 64, 66, 69, 73, 80, 84. [note continued]



**5. The lien for wages would be available as security even if this action were brought solely to collect "Employer Contributions" as being due under the individual employment contracts.**

Respondents could not defeat the maritime lien simply by establishing that the action is for "Employer Contributions" rather than for the cash value of the fractional rights to deferred compensation. For purposes of argument in this section, we shall assume that the seaman's contract did not specify an obligation to provide the fractional rights but specified only - as to the deferred compensation part of the consideration for maritime services - that the employer had the obligation to pay these contributions. The other facts and their legal consequences-including the equivalence between the amount of the contributions and the value of the fractional rights-are as discussed above.

In case a seaman's vessel fails to make the contributions he has earned and the trust fails to secure collection of these funds through its own efforts, the seaman would be entitled to proceed in court to enforce the obligation to pay contributions to the trusts. Once he has worked, he has this right as part of the multi-obligation wage consideration he earned under his individual contract of employment. Whether he gets the benefits that the trusts provide because there is an obligation to pay contributions or because they are paid, the seaman has a legal right to compel the payment of these contributions to satisfy the obligation to him created by his working on the vessel. This right is protected by the lien for wages. Upon the failure of the vessel's operator to pay these sums, as here, the seaman can libel the vessel to require their payment to the trusts.

As the seamen can libel the vessel, to the trusts can stand in the shoes of the seamen to collect them in this way. The trust pays

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The existence of deferred compensation trusts was known to all concerned. See Reply Br. App. ¶¶ 17-24; 25-29; etc.

Neither respondent can say that an amount of unpaid wages covered by the lien was a "secret" to it. Neither the trusts nor the unions nor the non-privy employers had their knowledge or their access to details. It was respondents, not the trusts, that were permitting the operators to run up excessive liabilities secured by the vessels libeled.



money out on the basis of the rights that the seamen have that the required payments be made into the trusts.<sup>19</sup> The seaman has the lien to secure the payment of these amounts. Having advanced to the seaman the value of the contributions in reliance on the lien-by giving him credit for the fractional rights that he earned, which have value equal to these contributions (see 10, *supra*)-the trust gained the lien security for these wages. This lien is extinguished only when the amounts owed are paid by the vessel's representative.

### CONCLUSION

Applicable admiralty law, which has been presented in some detail to this Court, establishes that a vessel stands as security for all types of compensation that are payable to members of its crew for the performance of maritime services upon it. The priority of this lien has been recognized in admiralty decisions over scores of years. Maritime services have been performed; the vessel and its operator have failed to provide the money that is necessary to meet these wage obligations. The lien against the vessel stands as security to require that the vessel or its operator pay these sums. The trusts have advanced the seaman his agreed wages in reliance on the lien. We submit it should be enforced in this proceeding.

Respectfully submitted,

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---

19. The seamen have designated the trusts as their agent to enforce their rights to have these contributions paid to provide funds for the deferred compensation rights they acquire by working on the vessel. Through their duly designated exclusive collective bargaining agent, the seamen have directed and authorized the trusts to collect these "wages", the rights to have contributions paid.

**CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD ERNST

In the

United States Court of Appeals  
For the Ninth Circuit

JUL 7 1968

JOHN A. CROSS, et al.,

vs.

*Appellants,*

No. 21719

S.S. KAIMANA, her engines, etc., et al.,

*Appellees.*

JOHN A. CROSS, et al.,

vs.

*Appellants,*

No. 21719A

S.S. LANAKILA, her engines, etc., et al.,

*Appellees.*

JOHN A. CROSS, et al.,

vs.

*Appellants,*

No. 21719B

S.S. ALASKA BEAR, her engines, etc., et al.,

*Appellees.*

JOHN A. CROSS, et al.,

vs.

*Appellants,*

No. 21719C

S.S. PACIFIC BEAR, her engines, etc., et al.,

*Appellees.*

JOHN A. CROSS, et al.,

vs.

*Appellants,*

No. 21719D

S.S. COAST PROGRESS, her engines, etc., et al.,

*Appellees.*

FILED

Appendix to  
Reply Brief of Appellants

JUN 28 1968

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## *Appendix*

### *Excerpts from record*

#### *First Preferred Ship Mortgage (C.T. 8-A—8-AA)*

The mortgage papers in the present record show numerous substantive safeguards and policing procedures in the mortgage documents.

¶ 1

The purchaser promised that no person would have any right or power to create "any liens whatsoever other than liens for crew's wages and salvage . . ." (C.T. 8-E):

§ 7. Neither the Shipowner, any charterer, the Master of the Vessel, nor any other person has or shall have any right, power or authority to create, incur or permit to be placed or imposed upon the Vessel, its freights, profits or hire, any liens whatsoever other than liens for crew's wages and salvage and the lien of this Mortgage.<sup>1</sup>

¶ 2

The ship purchaser agreed to refrain from continuing any lien, encumbrance, or charge on the vessel and cause such liens to be paid or discharged within 20 days after the sums become due and payable (C.T. 8-F):

§ 9. Except for the lien of this Mortgage, the Shipowner will not suffer to be continued any lien, encumbrance or charge on the Vessel, and in due course and in any event within twenty (20) days after the same becomes due and payable, will pay or cause to be discharged or make adequate provision for the satisfaction or discharge of all claims or demands, or will cause the Vessel to be released or discharged from any lien, encumbrance or charge therefor.<sup>2</sup>

The purchaser promised that the mortgagee or its authorized representatives had full and complete access to the vessel (C.T. 8-H):

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1. See also Art. 1 § 5 of Exhibit C to petition; C.T. 820:7-8 and Art. 1, clause 9 of Exhibit M to petition; C.T. 830: 24-26.

2. See also Art. 1, clause 9 of Exhibit M to petition; C.T. 830: 24-26.

## ¶ 3

§ 12. The Shipowner will at all reasonable times afford the Mortgagee or its authorized representatives full and complete access to the Vessel for the purpose of inspecting the same and its cargo and papers and, at the request of the Mortgagee, will deliver for inspection copies of any and all contracts and documents relating to the Vessel, whether on board or not.<sup>3</sup>

## ¶ 4

The purchaser agreed to furnish to the mortgagee "from time to time such information concerning the operations and financial condition of the [purchaser] as to the mortgagee may reasonably request" (C.T. 8-J):

§ 21. The Shipowner will furnish to the Mortgagee from time to time such information concerning the operations and financial condition of the Shipowner as the Mortgagee may reasonably request.<sup>4</sup>

## ¶ 5

The purchaser agreed to refrain from creating any liens other than "liens for current crew's wages and salvage incurred" (C.T. 8-K):

§ 22. The Shipowner covenants and agrees that without the written approval of the Mortgagee, so long as this Note shall be outstanding, the Shipowner will not, except as otherwise permitted below in this § 22:

\* \* \*

(d) Create, assume or suffer to exist any further mortgage, pledge, encumbrance, lien or charge of any kind upon any of its property or assests, whether now owned or hereafter acquired, or enter into any conditional sale or other title retention agreement, except (i) the Mortgage and two Preferred Mortgages on the vessel S.S. INDIAN BEAR, (ii) liens for current crew's wages and salvage

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3. See also Art. 1 § 9 of Exhibit C to petition; C.T. 820: 7-8 and Art. 1, clause 9 of Exhibit M to petition; C.T. 830: 24-26.

4. See also Art. 1 § 9 of Exhibit C to petition; C.T. 820: 7-8 and Art. 1, Clause 9 of Exhibit M to petition; C.T. 830: 24-26.



incurred in the ordinary course of operation of the Vessel and on said S.S. INDIAN BEAR, and (iii) liens for taxes not delinquent or being contested in good faith;<sup>5</sup>

¶ 6

(e) Incur any indebtedness except (i) the indebtedness evidenced by the Note, (ii) the indebtedness secured by the Mortgages on the vessel S.S. INDIAN BEAR, (iii) current liabilities for accounts payable and expense accruals incurred or assumed in the ordinary course of business, which accounts payable shall not have remained unpaid for a period of six months after the same became an account payable or which shall be currently contested by the Shipowner in good faith, (iv) liabilities for taxes not delinquent or being contested in good faith, and (v) borrowings for a period of less than one year in an aggregate principal amount not exceeding \$100,000 at any one time outstanding;<sup>6</sup>

¶ 7

The preferred ship mortgage sets forth in great detail a number of other general limitations upon the activities of the mortgagor that requires it to carry on all its business affairs so as to protect the security of the ship mortgage (C.T. 8-B - 8-W):

§ 16. (a) The Shipowner will, at its own expense, carry and maintain in connection with the Vessel insurance in such amounts, in such form and against such risks as the Mortgagee may reasonably require and with such insurance companies, underwriters, associations, clubs or funds as the Mortgagee may approve.

(b) All insurance which the Shipowner may be required to carry and maintain as provided in § 16 (a) hereof shall name the Mortgagee as an assured.

\* \* \*

§ 18. The Shipowner will not, without the written consent of the Mortgagee first had and obtained, consent to any

---

5. See also Art. 1, clause 9 of Exhibit M to petition; C.T. 830: 24-26.

6. See also Art. 1 clauses 20, 21 of Exhibit M to petition; C.T. 830: 24-26.



§ 7

modification or amendment of the Charter (other than an extension thereof), waive or release any obligation of the Charterer under the Charter, consent or agree to any act or omission to act on the part of the Charterer under the Charter, which act or omission without such consent or agreement would constitute a default under the Charter, appoint or approve any arbitrator whose appointment by the Shipowner is contemplated by the Charter, or fail promptly and diligently to exercise each and every right which it may have under the Charter, or fail to deliver a copy of each demand, notice, communication or other document (except those received in the regular course of business) delivered to it in any way relating to the Charter. Any one written consent hereunder shall not be construed as a waiver of the necessity for a further written consent to any second exercise by the Shipowner of any privilege granted by the previous written consent.

§ 8

§ 22. The Shipowner covenants and agrees that without the written approval of the Mortgagee, so long as this Note shall be outstanding, the Shipowner will not, except as otherwise permitted below in this § 22:

(a) Engage in any business other than owning, chartering and operating the Vessel and the vessel S.S. INDIAN BEAR, Official Number 252568;

§ 9

(b) Declare or pay any dividend (except dividends payable in its capital stock now or hereafter authorized) on any shares of any class of its capital stock now or hereafter outstanding, or return any capital to its stockholders or make any other distribution, payment or delivery of property or cash to its stockholders as such, or redeem, retire, purchase or otherwise acquire, directly or indirectly, any shares of any class of its capital stock now or hereafter outstanding;

§ 10

(c) Enter into any transaction of merger or consolidation with any other legal entity or corporation or sell,

lease or transfer or otherwise dispose of all or a substantial part of its assets except said vessel S.S. INDIA BEAR;<sup>7</sup>

### § 11

As a sanction to require compliance with these provisions, the seller or lender has the power to accelerate a time of payment of the full amount of loan, in case of any default in the items discussed above and in many other respects (C.T. 8-L, - 8-0):

§ 1. In case any one or more of the following events herein termed "events or default" shall happen:

(a) Default in the payment of any amount of principal of or interest of the Note when due and the same shall continue for ten (10) days;<sup>8</sup>

(b) If the payment of the proceeds of sale or seizure of, or of any insurance carried on or in respect of the Vessel, shall not have been received by the Mortgagee within ten (10) days after the same are payable;

(c) Failure on the part of the Shipowner diligently to exercise any right under the Charter or any renewal thereof and the continuance of same for twenty (20) days after receipt by the Shipowner of notice thereof from the Mortgagee;

(d) Default in the due and punctual observance and performance of any provision of §§ 5, 8, 9, 10, 13, 14, 18 or 22 of Article I hereof;

\* \* \*

### § 12

"Then and in each and every such case the Mortgagee shall have the right to:

(1) Declare the principal amount of the Note together with accrued interest thereon to be due and payable forthwith, and upon such declaration the entire unpaid principal of and interest on the Note shall become and be immediately due and payable, and there-

---

7. See also ¶¶ 67, 75.

8. See also Art. II § 1, subd. (a) of Exhibit C to petition; C.T. 820:7-8, and Art. II, clause 1, subd. (a) of Exhibit M to petition; C.T. 830: 24-26.

after shall bear interest at the rate of six per cent (6%) per annum;<sup>9</sup>

### ¶ 13

To supplement these sanctions the mortgagee was given power to take a variety of other actions in policing his loan and the mortgagor's affairs (C.T. 8-B - 8-W):

§ 1. In case any one or more of the following events herein termed "events of default" shall happen:

\* \* \*

"Then and in each and every such case the Mortgagee shall have the right to:

\* \* \*

(2) Exercise all of the rights and remedies in foreclosure and otherwise given to mortgages by the provisions of the Ship Mortgage Act, 1920, and all acts amendatory thereof and supplemental thereto;

### ¶ 14

(3) Bring suit at law, in equity, or in admiralty, as it may be advised, to recover judgment for any and all amounts due under the Note, or otherwise hereunder, and collect the same out of any and all property of the Shipowner whether covered by this Mortgage or otherwise;<sup>10</sup>

### ¶ 15

(4) Take and enter into possession of the Vessel at any time, wherever the same may be, without legal process and without being responsible for loss or damage; and the Shipowner or other person in possession forthwith upon demand of the Mortgagee shall surrender to the Mortgagee possession of the Vessel, . . ."<sup>11</sup>

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9. See also Art. II, § 1, subd. (1) of Exhibit C to petition; C.T. 820:7-8 and Art. II, clause 1, subd. (1) of Exhibit M to petition; C.T. 830:24-26.

10. See also Art. II, § 1, subd. (2) of Exhibit C to petition; C.T. 820: 7-8 and Art. II, clause 1, subd. (2) of Exhibit M to petition; C.T. 830: 24-26.

11. See also Art. II, § 1, subd. (3) of Exhibit C to petition; C.T. 820: 7-8 and Art. II, clause 1, subd. (4) of Exhibit M to petition; C.T. 830: 24-26.



## § 16

(5) Take and enter into possession of the Vessel at any time, wherever the same may be, without legal process, and if it seems desirable to the Mortgagee and without being responsible for loss or damage, sell the Vessel at any place and at such time as the Mortgagee may specify and in such manner as the Mortgagee may deem advisable, free from any claim by the Shipowner in admiralty, in equity, at law or by statute, after first giving notice of the time and place of sale with a general description of the property in the following manner:<sup>12</sup>

\* \* \*

*Seafaring Fringe Benefits, Welfare, Pension, Employment Security, Vacations, as of January 1, 1957*, published by U. S. Department of Commerce (Exhibit 2 attached to Trustee Exhibit 1, p. 1.)

## § 17

The establishment and rapid expansion of pension and welfare plans by employers and unions through collective bargaining is recognized as one of the outstanding developments of the seafaring industry in recent years. Since fringe benefits are being accepted more and more as a substantial component of the employer's wage bill, it may be of interest to present a brief history of welfare (health and insurance) and pension plans.

\* \* \*

## § 18

The most important single action which gave impetus to the expansion of negotiated fringe benefits, was the United Mine Workers Union's industry-wide-pension-welfare plan, established in 1946, covering almost a million potential beneficiaries. Additional momentum was generated by the steel industry employees' benefit program in 1949. In both instances these plans crystallized from labor-management negotiations. Other factors contributing substantially to the rapid growth of employee coverage under negotiated welfare-pension plans were:

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12. See also Art. II, § 1, subd. (4) of Exhibit C to petition; C.T. 820: 7-8 and Art. II, clause 1, subd. (5) of Exhibit M to petition; C.T. 830: 24-26.

## § 19

1. The government's tax policy permitting deductions for welfare and pension contributions.

## § 20

2. The National Labor Relations Board's and Supreme Court's decisions and affirmation holding employers responsible for bargaining in regard to pensions.

## § 21

3. The Steel Fact Finding Board's report that industry had both social and economic obligations to provide workers with social insurance and pensions.

## § 22

4. The decline in purchasing power of Federal Social Security payments, resulting from rising living costs.

## § 23

Seafaring Fringe Benefits.—Concurrent with the rapidly expanding private social security programs in business establishments ashore, was the equally rapid development of seafaring pension-welfare plans. Since 1950, negotiations concerning this type of fringe benefits have been extended to such a degree that they must be considered substantial components of Maritime collective bargaining and operator-union contracts.

## § 24

Union requests and subsequent negotiations for contract improvements have included "package" demands embracing basic wages, overtime, vacations for members of the seafaring unions, and have emphasized social security protection in the form of welfare-pension advantages and employment security.

\* \* \*

*Amendments to the Davis-Bacon Act*, Senate Report No. 963, 88th Cong., 2d Sess., March 17, 1964, p. 3 (Trustee Exhibit 5).

## § 25

Welfare and pension plans have experienced a phenomenal growth. In a report of this committee issued in 1958 it was then estimated that almost 85 million persons were relying on benefits from such plans. According to recent figures furnished the committee by the Department of Labor, that number has now reached almost 110 million. The Department of Labor also advises that the employer's share of contributions to health and welfare benefit plans has increased from 47 percent in 1954 to 71 percent in 1961. Also, employers now finance 85 percent of the cost of retirement plans and almost all multiemployer and unfunded pension plans



are financed entirely by employer contributions. As stated in our 1958 report:

¶ 26

*Regardless of the form they take, the employer's share of the cost of these plans or the benefits the employers provide are a form of compensation.*

¶ 27

This view is additionally buttressed by the fact that the courts have held these benefit plans to be bargainable issues under provisions of the National Labor Relations Act requiring both parties to bargain collectively in good faith on "wages, hours, and other terms and conditions of employment." The courts have also held that an employer may be compelled to make payments he owes to a pension and welfare plan under the bonding provisions of the Miller Act.

#### THE NEED FOR AND EFFECT OF THE LEGISLATION

¶ 28

There are many localities throughout the country in which the great majority of contractors provide fringe benefits in addition to the cash wages paid to their employees. As we have indicated, *these fringe benefits clearly constitute a form of wages*. Therefore, if they are not included in the prevailing wage determinations, only a part of the compensation for employment is reflected. Under such circumstances, the minority of employers operating in the locality who do not provide the prevailing fringe benefits now enjoy an unfair advantage in bidding on Federal and federally assisted construction projects. By not providing for their employees the benefits that prevail in the locality these employers are now able to enter lower bids than the local employers who maintain adequate wage standards.

¶ 29

The Davis-Bacon Act does not define the term "wages" as used in the act. Because of the act's requirement that wages be paid unconditionally, fringe benefits that are contingent in nature cannot now be included in the wage determinations. [Emphasis added]



*ILWU-PMA Welfare Plan Agreement*, January 26, 1950.  
(Trustee Exhibit 12, p. 3).

§ 30

e. It is the understanding of the parties hereto that the employer contributions to be paid into the Fund shall not constitute or be deemed wages to the employees. Should such contributions be determined by any court or other governmental authority to be wages to the employees, it is agreed that the employers' contributions may be renegotiated to the end that such contributions theretofore or thereafter made plus the resulting additional taxes will not exceed the sum which the employers would pay hereunder if their contributions had not been so determined to be wages.<sup>13</sup>

\* \* \*

*Documents of the plans (Vessels' Exhibit 2)*

*MMP-PMA Welfare Plan Amended Agreement*  
(January 1, 1959)

§ 31

(d) It is further understood that payment of the contributions to the Association shall be deemed payment of contributions into the Fund as of the moment they are transmitted to the Association. *It is intended that contributions of the Employers hereunder shall neither constitute nor be deemed wages or income due to licensed deck officers within the meaning of the state and federal income and employment tax laws.* Such contributions shall not in any manner be liable for or subject to the debts, contracts or liabilities of licensed deck officers, Employers, Association, or Union. No licensed deck officer shall have the right to receive any part of the contributions instead of benefits. No licensed deck officer may assign any benefit or receive a cash consideration in lieu of any benefit either upon the termination of the Plan, his

13. Compare *Genix Supply Co. v. Board of Trustees*, ..... Nev. ...., 438 P.2d 816 (March 29, 1968).

"Reference is made to the method of computation of the contributions to the trust funds, by monthly flat rates or hourly flat rate. We are not impressed with any special significance of that fact or that the language in the collective bargaining agreements and trust agreements use the word, 'contributions,' and even specify that contributions are not to be construed as wages. Those documents within themselves are drawn for taxation purposes."

termination of employment with any Employer, anyone's withdrawal from the Plan, or otherwise. [Emphasis added]

§ 32

In the event that a ruling is issued or a determination is made that such contributions are "wages" or "income" for such purposes, the Union and the Association agree, if it is in any way possible, to make such amendments or revisions to this Agreement and to the said Declaration of Trust as are necessary to accomplish the aforesaid intention.

\* \* \*

§ 33

§ 8. *Nonmember Contributions to the Fund.*

Employers who are not parties to the collective bargaining agreement signed by the Association, *by making like contributions as required hereunder*, and the Union, acting in the capacity of an employer, by making contributions to cover the cost of the benefits of the Plan hereinabove referred to, may participate in the MMP-PMA Welfare Plan and obtain the advantages for their employes (including Union officials) of the Plan on joint approval of and under terms specified by the Union and the Association. Such participation shall continue until either the Union or the Association withdraws its approval. Any such Employer and the Union, acting in the capacity of an employer, may withdraw from participation on written notice to the Trustees three months in advance of such withdrawal, but notwithstanding such withdrawal contributions for all days worked through the date of such withdrawal shall be paid.

*MEBA-PMA Welfare Plan—Third Amendment  
to Revised Agreement  
(February 1, 1954)*

§ 34

"(2) *Covered Employment*—Under the terms of this agreement, Covered Employment means employment either heretofore or hereafter by a Contributing Employer in a position including night or weekend relief jobs and employment pursuant to Section 24 covered by the said Collective Bargaining Agreement dated November 1, 1951, as amended, between PMA and MEBA and employment covered by an



agreement between the said Union and *a nonmember participant in the MEBA-PMA Plan during the period the respective nonmember is participating and for which contributions are paid*. A licensed engineer shall not be regarded as employed in Covered Employment on any day for which he is not paid or entitled to be paid wages by a Contributing Employer. Vacation time shall not be considered days of Covered Employment for purposes of contributions." [Emphasis added]

*ARA-PMA Welfare Plan Revised Agreement  
(December 10, 1957)*

§ 35

*Covered Employment*—Under the terms of this agreement, Covered Employment means employment either heretofore or hereafter by a Contributing Employer in a position covered by the said basic Agreement between PMA and ARA and *employment covered by an agreement between the said Union and a nonmember participant in the ARA-PMA Welfare Plan during the period the respective nonmember is participating and for which contributions are paid*. A radio officer shall not be regarded as employed in Covered Employment on any day for which he is not paid or entitled to be paid wages by a Contributing Employer. [Emphasis added]

§ 36

\* \* \*

It is intended that contributions of the Employers hereunder shall neither constitute nor be deemed wages or income due to Employees within the meaning of the state and federal income and employment tax laws.

§ 37

\* \* \*

In the event that a ruling is issued or a determination is made that such contributions are "wages" or "income" for such purposes, the Union and the Association agree, if it is in any way possible, to make such amendments or revisions to this Agreement and to the said Declaration of Trust as are necessary to accomplish the aforesaid intention.



*Appendix*  
*MSO-PMA Welfare Agreement*  
*(October 5, 1959)*

13

§ 38

(b) If a Contributing Employer is delinquent or defaults in payment of contributions, the lien against the ship for seamen's wages shall be available to the Trustees for the amount of contributions due. If suit is brought to recover contributions, interest thereof shall be payable at the rate of 7% from the date they are due under § 2, and all costs of collecting such delinquent or defaulted contributions, including a reasonable attorney's fee, shall be paid by the Contributing Employer.

\* \* \*

§ 39

(e) It is further understood that payment of the contributions to the Association shall be deemed payment of contributions into the Fund as of the moment they are transmitted to the Association. It is intended that contributions of the Employers hereunder shall neither constitute nor be deemed income due to staff employees within the meaning of the state and federal income and employment tax laws.

\* \* \*

§ 40

(c) If such [non-member] employer should default or become delinquent in the payment of its contributions or in the performance of any other obligation under this Agreement or any amendments to this Agreement and should fail to cure such default or delinquency within ten (10) days after notice thereof from the Trustees, the Association, or the Union, *no applicant for welfare benefits shall be credited with any Covered Employment by such employer with respect to which such employer has not paid contributions.*

§ 41

(d) In the event that such employer should withdraw or be eliminated from participation in the plan as provided in § 8(a) of this Agreement or that its participation therein should be otherwise terminated prior to termination of the plan, it shall nevertheless remain obligated for Employer Contributions on account of Covered Employment occurring prior to the date of such elimination or termination and shall have no right to the return of any

contributions theretofore made, nor shall such employer have any other right in, to, or against the Fund, the Trustees, or any of the parties to this Agreement. In the event of such elimination or termination, staff employees applying for welfare benefits shall not be credited with any Covered Employment by such employer with respect to which such employer has not paid contributions.

\* \* \*

Members on whose behalf Pacific Maritime Association executed this agreement:

\* \* \*

Other Contributing Employers executing this agreement:

§ 42

\* \* \*

PACIFIC FAR EAST LINE

By T. E. CUFFE

*SIU Pacific District-PMA Pension Plan Agreement  
(July 31, 1957)*

§ 43

The initial Trustees designated by the Association shall be J. Paul St. Sure, T. E. Cuffe and Bent Damsgaard. The initial Trustees designated by the Union shall be Morris Weisberger, to represent the unlicensed deck department, S. E. Bennett to represent the unlicensed engine department, and Ed Turner to represent the stewards department. The initial neutral Trustee shall be J. F. Sullivan, Jr.

*SIU Pacific District-PMA Pension Plan—Second Amendment  
(March 31, 1959)*

§ 44

“(c) It is expected that the contributions into the fund, while being deferred compensation, shall not otherwise constitute or be deemed wages to employees. Such amendments shall be made to this agreement and the Declaration of Trust as may be necessary to carry out this intent, provided, they do not otherwise affect the status of this plan under Sections 401, 501, and 404 of the Internal Revenue Code of 1954.”

*SIU Pacific District-PMA Pension Plan—Declaration of Trust*  
(July 31, 1957)

¶ 45

In Witness Whereof, the Trustees have executed this instrument to evidence their acceptance of the said trust and their agreement to be bound by said Pension Plan Agreement as of the day first above written.

## UNION TRUSTEES

MORRIS WEISBERGER

ED TURNER

S. E. BENNETT

## NEUTRAL TRUSTEE

J. F. SULLIVAN, JR.

## ASSOCIATION TRUSTEES

T. E. CUFFE

BENT DAMSGAARD

J. PAUL ST. SURE

*SIU Pacific District-PMA Pension Plan—First*  
*Amendment to Declaration of Trust*  
(June 26, 1959)

¶ 46

This First Amendment entered into this 26th day of June, 1959, by and between all of the Trustees for the SIU Pacific District-PMA Pension Plan (hereinafter referred to as "Trustees") created by that certain Declaration of Trust dated July 31, 1957,

\* \* \*

T. E. CUFFE

J. PAUL ST. SURE

K. F. SAYSETTE

ED TURNER

MORRIS WEISBERGER

S. E. BENNETT

J. F. SULLIVAN, JR.



The foregoing is approved:

PACIFIC MARITIME ASSOCIATION  
J. PAUL ST. SURE

The foregoing is approved:

SEAFARERS INTERNATIONAL UNION OF  
NORTH AMERICA, PACIFIC DISTRICT  
SAILORS' UNION OF THE PACIFIC  
MORRIS WEISBERGER  
MARINE FIREMEN'S UNION  
S. E. BENNETT  
MARINE COOKS AND STEWARDS—AFL  
ED TURNER

*MFOW-PMA Welfare Plan—Second Amendment*  
(February 1, 1958)

¶ 47

§ 8. *Nonmember Contributions to the Fund.*—Employers who are not member Employers and their employes may, *by making like contributions as required hereunder*, participate in the MFOW-PMA Welfare Plan and obtain the advantages of the Declaration of Trust hereinabove referred to on joint approval of and under terms specified by the Marine Firemen's Union and the Association. Any such Employer may withdraw from participation on written notice to the Trustees and to the Union and the Association three months in advance of such withdrawal, but such withdrawal shall, with respect to contributions made to the date of such withdrawal, be subject to the provisions of Paragraph 4 of the Declaration of Trust relating to the expenditure of the Fund by the Trustees. Any such Employer may be eliminated from participation in the plan by agreement of the Marine Firemen's Union and the Association, provided written notice is given to the Trustees and to such Employer three months in advance of such elimination. [Emphasis added]

SIU Pacific District-PMA Supplemental Benefits Agreement  
(October 1, 1958)

## III.

CONTRIBUTIONS TO SUPPLEMENTAL  
BENEFITS FUND

§ 48

(a) Each member Contributing Employer shall contribute to the Supplemental Benefits Fund for each day of Covered Employment of eligible seamen by such Contributing Employer beginning October 1, 1958, in the manner hereinafter set forth. . . .

\* \* \*

§ 49

*If a Contributing Employer is delinquent or defaults in payment of contributions, the lien against the ship for seamen's wages shall be available to the Trustee and if suit is brought to recover such contributions, interest thereon shall be payable at the rate of 7%, and all costs of collecting such delinquent or defaulted contributions, including a reasonable attorney's fee, shall be paid by the Contributing Employer.*

\* \* \*

## VIII.

ADDITIONAL PARTICIPATION IN THE PLAN

§ 50

(a) Each nonmember company named in Exhibit A shall be deemed a Contributing Employer within the meaning of this Supplemental Benefits Agreement *with respect to employment for which contributions are paid by the company* and, except as herein otherwise expressly provided, this Supplemental Benefits Agreement shall have the same force and effect as if the company had been named as a member Contributing Employer, and "Qualifying Employment" shall include unlicensed employment on the company's vessels with respect to which contributions are paid hereunder. *Days for which the required contributions are paid by any such company and with respect to which the specified reports are filed, shall be days of service in Qualifying Employment in computing eligibility for supplemental benefits.*

\* \* \*

## § 51

This Agreement is dated October 1, 1958.

SEAFARERS INTERNATIONAL UNION OF  
NORTH AMERICA, PACIFIC DISTRICT

SAILORS' UNION OF THE PACIFIC

MORRIS WEISBERGER

MARINE FIREMEN'S UNION

S. E. BENNETT

MARINE COOKS & STEWARDS', AFL

ED TURNER

PACIFIC MARITIME ASSOCIATION

J. PAUL ST. SURE

ALASKA STEAMSHIP CO.

L. C. WESSON

AMERICAN PRESIDENT LINES

GEORGE KILLION

PACIFIC FAR EAST LINE

T. E. CUFFE

## § 52

The assets of the Sailors' and Firemen's Vacation Fund are transferred to SIU Pacific District-PMA Supplemental Benefit Fund, Inc. subject to the terms set forth above and with the approval of the parties to the Agreement establishing such fund:

J. F. SULLIVAN, JR.

MORRIS WEISBERGER

T. E. CUFFE

S. E. BENNETT

J. PAUL ST. SURE

Trustees administering the Sailors' and  
Firemen's Vacation Fund—Declaration  
of Trust dated October 1, 1953

SAILORS' UNION OF THE PACIFIC

MORRIS WEISBERGER

MARINE FIREMEN'S UNION

S. E. BENNETT

PACIFIC MARITIME ASSOCIATION

J. PAUL ST. SURE



## § 53

The assets of the Stewards' Vacation Fund are transferred to SIU Pacific District-PMA Supplemental Benefits Fund, Inc. subject to the terms set forth above and with the approval of the parties to the Agreement establishing such fund:

LOUIS FOYT

ED TURNER

K. F. SAYSETTE

J. PAUL ST. SURE

Trustees administering the Stewards'  
Vacation Fund—Declaration of Trust  
dated December 13, 1955

MARINE COOKS & STEWARDS, AFL

ED TURNER

PACIFIC MARITIME ASSOCIATION

J. PAUL ST. SURE

## § 54

SIU Pacific District-PMA Supplemental Benefits Fund, Inc. executes this instrument to evidence its acceptance of the trust set forth above and its agreement to be bound by the SIU Pacific District-PMA Supplemental Benefits Agreement as of the day first above written:

SIU PACIFIC DISTRICT-PMA SUPPLE-  
MENTAL BENEFITS FUND, INC.

J. F. SULLIVAN, JR.

ED TURNER

MORRIS WEISBERGER

K. F. SAYSETTE

T. E. CUFFE

S. E. BENNETT

J. PAUL ST. SURE

Trustees.

*Hearings Before the Subcommittee on Affairs of the Committee on Merchant Marine and Fisheries, House of Representatives, on "Miscellaneous Maritime Bills", 81st Cong., 2d Sess. (1950), Vessel Exhibit C-2, pp. 15-18.*

[15]

THE CHAIRMAN. The subcommittee will now proceed to the consideration of H. R. 8349.

THE SECRETARY OF COMMERCE,  
*Washington, D. C.*

§ 55

The bill follows the pattern of section 302 (c) (5), Labor Management Relations Act 1917 (Public Law 101, 80th Cong.). That section, however, covers in greater detail the basis of such payments, as well as administration of the fund, and also contains specific provisions concerning payments to provide pensions or annuities. *While this section of the act, as general legislation, has been cited as sufficient basis for making the deductions from seamen's wages for payment into employee welfare funds, a view expressed by the Commandant of the United States Coast Guard under date of April 14, 1950, the bill, if enacted, would remove any doubt concerning such deductions. Senator Magnuson indicated (Congressional Record, April 27, 1950, p. 5933) that confusion existed as to whether deductions from seamen's wages for purposes of a welfare fund are legal and that the bill, which he introduced, would make clear that the restrictions upon allotments from seamen's wages do not extend to voluntary deductions for a welfare plan.*

§ 56

\* \* \*

It is believed that seamen should have the right to authorize deductions from their wages for payment into welfare funds,

[16]

established as the result of collective bargaining agreements or otherwise, and that any legal doubt as to their validity should be eliminated. [Emphasis added]

TREASURY DEPARTMENT,  
*Washington, August 17, 1950.*

§ 57

It is understood that the proposed legislation has been introduced to resolve any legal conflict which may now exist between the provisions of section 10 of the act of June 28, 1884, as amended, which prohibits deductions from employees' wages except under certain conditions, and section 302 of the Labor-Management Relations Act of 1947, which authorizes payments by an employer to a representative of the employees to a trust fund established for the benefit of the employees.

---

FEDERAL SECURITY AGENCY,  
*Washington, August 21, 1950.*

§ 58

Seamen are now covered by old-age and survivors insurance and unemployment insurance. They should, however, have the same opportunities that other workers have to obtain supplementary protection through private employee, benefit plans. The proposed bill would facilitate the establishment of contributory benefit plans by permitting the employer to make deductions from the seaman's wages for this purpose.

[17]

DEPARTMENT OF LABOR,  
OFFICE OF THE SECRETARY,  
*Washington, October 10, 1950.*

§ 59

Welfare funds are now a frequent subject of collective bargaining in many industries in this country. The amendment of the existing law, as prescribed in the bill, would make it possible, consistent with our national policy of encouraging collective bargaining, for labor and management in the shipping industry to bargain for the joint establishment and support of pension and other welfare plans.

\* \* \*

THE CHAIRMAN. Now we will refer to H. R. 8349, on which you came to testify, Commander, which is a bill to authorize de-



ductions from the wages of seamen for payment into employee-welfare funds.

## [18]

STATEMENT OF COMMANDER ROBERT H. FARINHOLT,  
CHIEF, RECORDS AND WELFARE SECTION, MERCHANT  
VESSEL PERSONNEL DIVISION, COAST GUARD

Commander FARINHOLT. Referring to H. R. 8349, this question was presented to us in April of 1950.

## § 60

We found that, under the provisions of 28 United States Code, 186 (5), the employer of a seaman and the duly elected collective-bargaining representative of the seaman may mutually agree to the establishment of a trust fund, and that the funds for such trust fund may be deducted by the employer from the wages of the seaman who is a member of the union which is serving as the collective-bargaining agent.

## § 61

In other words, *under that act, as to a seaman who is not a member of a union, a deduction cannot be made from his wages.* In the case of this bill, the way we understand it, it would allow such a deduction from the wages of a seaman regardless of whether or not he was a member of a union; and, therefore, we are in favor of it. [Emphasis added]

*Service Contract Act of 1965, Public Law 89-286; Stat. 1034 (October 22, 1965)*

The obligation under the subparagraph [to pay the prevailing level of fringe benefits in addition to prevailing cash payments] may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

*Fourth Amendment of Mortgage on SS Coast Progress (ex Nevadan), Official number 249264 (Exhibit I to petition; see C.T. 825: 17-18)*

¶ 63

This agreement made as of the 29 day of October, 1959, between United States of America, represented by the U. S. Department of Commerce, acting through the Maritime Administrator, successor to the United States Maritime Commission (hereinafter called the "Mortgagee"); and Coastwise Line, a corporation organized and existing under the laws of the State of Oregon (hereinafter called the "Mortgagor"),

## WITNESSETH:

Whereas:

¶ 64

1. Under date of January 22, 1951, American-Hawaiian Steamship Company (Del.) executed and delivered to the Mortgagee a promissory note (hereinafter sometimes called the "note") in the original principal sum of One Million One Hundred Sixty Thousand Four Hundred Dollars (\$1,160,400.00), payable in fifteen (15) consecutive and equal installments of Seventy-Seven Thousand Three Hundred Sixty Dollars each (\$77,360.00), serially one installment each year thereafter over a period of fifteen (15) years, the date of payment respectively being January 22 of the years set opposite their numbers hereinbelow:

Installment	Year of Payment	Installment	Year of Payment
1 .....	1952	9 .....	1960
2 .....	1953	10 .....	1961
3 .....	1954	11 .....	1962
4 .....	1955	12 .....	1963
5 .....	1956	13 .....	1964
6 .....	1957	14 .....	1965
7 .....	1958	15 .....	1966
8 .....	1959		

The principal bearing interest at the rate of 3½% percent per annum payable January 22 and July 22 of each year; and

\* \* \*



## § 65

Now, Therefore, in consideration of the premises and the mutual and dependent covenants, promises and agreements hereinafter set forth, the parties hereto agree as follows:

## § 66

First: Notwithstanding any provision to the contrary in the Mortgage, as amended, or in the note, the installments of principal otherwise due on January 22, 1959, and on January 22, 1960, shall be due and payable on January 22, 1965.

## § 67

Second: The second paragraph of Section 9 of Article I of the Mortgage is hereby amended by deleting the word "and" at the end of item 6 and by deleting the following words and figures:

"7. No salary at a rate in excess of \$25,000 per annum shall be paid,

if after such transaction, the amount of working capital or the amount of net worth thereby would be reduced below the minima prescribed in or required under subdivisions (ii) and (iii), respectively, of subparagraph (2) of paragraph (a) of Section 299.21, as amended, of the Regulations; and"

and inserting in lieu thereof the following words and figures:

"7. No salary (including the value or amount of any bonus, commission or other form of direct compensation) at a rate in excess of \$25,000 per annum shall be paid; and

"8. No fixed assets shall be purchased or acquired;

unless the prior written approval of the Mortgagee is first obtained; and"

*Amendment of Preferred Mortgage on SS Coast Progress (ex Nevadan), Official number 249264 (Exhibit N to petition; see C.T. 832: 22-833:2)*

## § 68

This agreement made as of the 29th day of October, 1959, between The Bank of New York, a corporation organized and existing under and by virtue of the laws of the State of New York (hereinafter called the "Mortgagee"), and Coastwise Line, a corporation organized and existing under the laws of the State of Oregon (hereinafter called the "Mortgagor"),



## WITNESSETH:

Whereas:

§ 69

1. Under date of June 26, 1957, the Mortgagor, which is now the sole owner of the whole of the vessel SS Coast Progress (ex NEVADAN), of San Francisco, California, Official Number 249264 (hereinafter called the "Vessel"), executed and delivered to the Mortgagee a four and three-quarters percent ( $4\frac{3}{4}\%$ ) Preferred Ship Mortgage Note (hereinafter called the "Note") in the amount of Seven Hundred Eighty Thousand Dollars (\$780,000.00) payable in twenty-three (23) quarterly installments; the first twenty-two (22) of such installments being each in the amount of Thirty-Four Thousand Dollars (\$34,000.00) and the twenty-third being in the amount of Thirty-Two Thousand Dollars (\$32,000.00) payable on the 26th day of each September, December, March and June, beginning on September 26, 1957 until paid, together with interest at the rate of four and three-quarters percent ( $4\frac{3}{4}\%$ ) per annum; and

§ 70

2. The Note is secured by a Preferred Ship Mortgage dated June 26, 1957 (hereinafter called the "Mortgage"). . . .

\* \* \*

§ 71

7. The Mortgagee, the United States of America as Mortgagee under the First Mortgage, and the United States of America in its capacity as insurer of the Mortgage, have agreed with Mortgagor to postpone the payment of certain installments due under the Note and under the note secured by the First Mortgage; and Mortgagor has agreed, in consideration of the postponement of such installments, to amend the Mortgage and the Note in the manner hereafter provided.

§ 72

Now, Therefore, in consideration of the premises and the mutual and dependent covenants, promises and agreements hereinafter set forth, the parties hereto agree as follows:

§ 73

First: Notwithstanding any provision to the contrary in the Mortgage, as amended, or in the Note, the installments of principal otherwise due on December 26, 1959, March 26, 1960, June 26, 1960, and September 26, 1960, shall be due and payable on March 26, 1963. The Mortgagor covenants that upon request of

the Mortgagee, the Mortgagor will make an appropriate endorsement on the Note of the contents of this paragraph.

¶ 74

Second: The Mortgagee consents to the execution by the Mortgagor of the Amendment of the First Mortgage executed and delivered simultaneously herewith.

¶ 75

Third: Clause 24 of Article I of the Mortgage is hereby amended to read as follows:

"Clause 24. (a) The Mortgagor, by a separate agreement (herein called the "Restricted Fund Agreement"), has established and agreed to maintain a fund to be known as, and herein called, the 'Restricted Fund'.

*Fifth Amendment of Mortgage on SS Coast Progress (ex Nevadan) Official number 249264 (Exhibit J to petition; see C.T. 625: 20-32)*

¶ 76

This Agreement, made as of the 22nd day of December, 1960, between United States of America, represented by the U. S. Department of Commerce, acting through the Maritime Administrator, successor to the United States Maritime Commission (hereinafter called the "Mortgagee"); and COASTWISE LINE, a corporation organized and existing under the laws of the State of Oregon (hereinafter called the "Mortgagor"),

WITNESSETH:

Whereas:

¶ 77

\* \* \*

2. The note is secured by that First Preferred Mortgage on the vessel SS Coast Progress (ex Nevadan), Official Number 249264, of San Francisco, California (hereinafter called the "Vessel"), given by American-Hawaiian Steamship Company (Del.) to the Mortgagee bearing date of January 22, 1951, and recorded in the office of the Collector of Customs at New York, New York, on February 1, 1951, at 4:34 P.M. in Record Book No. PM 111, at page 84 (hereinafter sometimes called the "Mortgage"); and

\* \* \*

¶ 78



9. . . . [T]he unpaid balance of the principal of such Second Mortgage was insured in accordance with the provisions of Title XI of the Merchant Marine Act, 1936, as amended; and

\* \* \*

11. The Mortgagee, The Bank of New York as Mortgagee under the Second Mortgage, and the United States of America in its capacity as insurer of the Second Mortgage, have agreed with Mortgagor to postpone the payment of those certain installments due on January 22, 1961 and December 26, 1960, under the note and under the Second Mortgage Note, respectively; and Mortgagor has agreed, in consideration of the postponement of such installments, to amend the Mortgage and the note in the manner hereafter provided.

§ 79

Now, Therefore, in consideration of the premises and the mutual and dependent covenants, promises and agreements hereinafter set forth, the parties hereto agree as follows:

§ 80

First: Notwithstanding any provision to the contrary in the Mortgage, as amended, or in the note, the installment of principal otherwise due on January 22, 1961, shall be due and payable on March 26, 1961, together with any interest then accrued on the note.

§ 81

Second: The Mortgagee consents to the execution and delivery by Mortgagor of the Second Amendment to the Second Mortgage executed and delivered simultaneously herewith.

*Second Amendment of Preferred Mortgage on SS Coast Progress (ex Nevadan), Official no. 249264 (Exhibit O to petition; see C.T. 633:4-15)*

§ 82

This Agreement made as of the 22nd day of December, 1960, between The Bank of New York, a corporation organized and existing under and by virtue of the laws of the State of New York (hereinafter called the "Mortgagee") and Coastwise Line, a corporation organized and existing under the laws of the State of Oregon (hereinafter called the "Mortgagor"),



## WITNESSETH:

Whereas:

¶ 83

\* \* \*

3. Installments 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the Note in the aggregate amount of Three Hundred Six Thousand Dollars (\$306,000.00) have been paid, and there remains outstanding an aggregate amount of Four Hundred Seventy-Four Thousand Dollars (\$474,000.00) payable in quarterly installments as above set out; and

¶ 84

4. Installments 10, 11, 12 and 13 of the Note due December 26, 1959, March 26, 1960, June 26, 1960 and September 26, 1960, respectively, were postponed until March 26, 1963 by an Amendment of Preferred Mortgage dated as of the 29th day of October, 1959 between the Mortgagor and the Mortgagee, which Amendment of Preferred Mortgage was recorded in the office of the Collector of Customs for the Port of San Francisco-Oakland, California on November 2, 1959, at 11:29 A.M. in Record Book 12 P.M., at page 35 (the Preferred Ship Mortgage hereinabove referred to as so amended by said Amendment of Preferred Mortgage being hereinafter called the "Mortgage"); and

¶ 85

5. On June 26, 1957, the United States of America and the Mortgagee executed a Contract of Insurance of Mortgage, Contract No. MA-1570 pursuant to which the unpaid interest on and the unpaid balance of the principal of such Preferred Ship Mortgage was insured in accordance with the provisions of Title XI of the Merchant Marine Act, 1936, as amended, which Contract of Insurance of Mortgage was amended by an Amendment dated as of the 29th day of October, 1959 (said Contract of Insurance of Mortgage, as so amended, being hereinafter called the "Insurance Contract"); and

¶ 86

\* \* \*

8. The Mortgagee, the United States of America as Mortgagee under the First Mortgage, and the United States of America in its capacity as insurer of the Mortgage, have agreed with Mortgagor to postpone the payment of those certain installments

due December 26, 1960 and January 22, 1961 under the Note and under the note secured by the First Mortgage, respectively, and Mortgagor has agreed, in consideration of the postponement of such installments, to amend the Mortgage and the Note in the manner hereafter provided.

§ 87

Now, Therefore, in consideration of the premises and the mutual and dependent covenants, promises and agreements hereinafter set forth, the parties hereto agree as follows:

§ 88

First: Notwithstanding any provision to the contrary in the Mortgage, as amended, or in the Note, the installment of principal otherwise due on December 26, 1960, shall be due and payable on March 26, 1961.

*Notice of Acceleration and Demand for Immediate Payment*  
(Exhibit K to petition; see C.T. 628: 21-629-11)

U. S. DEPARTMENT OF COMMERCE  
Maritime Administration  
Washington 25, D. C.

May 1, 1961

Coastwise Line

\* \* \*

§ 89

Pursuant to Section 1 of Article II of the Mortgage, the United States of America, represented by the U. S. Department of Commerce, acting through the Maritime Administration, hereby (1) declares all the principal sum of the Mortgage Note now outstanding, with the accrued and unpaid interest thereon, to be due and payable immediately with the effect as provided in the Mortgage that the same shall become and is immediately due and payable, and thereafter shall bear interest at the rate of 6% per annum; and (2) demands that full and immediate payment be made to it of all the principal sum of the Mortgage Note now outstanding in the amount of \$541,520.00 and the accrued and unpaid interest thereon to the date hereof in the amount of \$5,140.73, together with interest on said outstanding principal

sum and on said accrued and unpaid interest at the rate of 6% per annum from and after the date of this declaration until paid.

\* \* \*

Thos. E. Stakem  
Maritime Administrator

*Notice of Accelleration and demand for immediate payment*  
(Exhibit V to petition; see C.T. 638:31-639:20)

U. S. DEPARTMENT OF COMMERCE  
Maritime Administration  
Washington 25, D. C.

May 1, 1961

Coastwise Line

¶ 90

\* \* \*

Pursuant to Clause 1 of Article II of the Mortgage, the United States of America, represented by the Secretary of Commerce, acting by and through the Maritime Administrator, hereby (1) declares the Note to be due and payable immediately with the effect as provided in the Mortgage and Note that the entire unpaid principal of and unpaid interest on the Note shall become and is immediately due and payable and that thereafter the entire unpaid principal of the Note shall bear interest at the rate of 6% per annum as provided in the Note; and (2) demands that full and immediate payment be made to it of the entire unpaid principal of the Note in the amount of \$474,000.00 and the unpaid interest thereon to the date hereof in the amount of \$7,900.35, together with interest on said unpaid principal at the rate of 6% per annum from and after the date of this declaration until paid.

\* \* \*



*Opinion of the Maritime Subsidy Board,*  
*Department of Commerce, Maritime Administration,*  
Docket No. A-14, July 13, 1965 (Trustee Exhibit D-A, 12-18).

## § 91

II. *Pension and welfare benefits, and employer contributions thereto, should be reasonable, predictable, and not inimical to the long range manpower needs of the industry.*

## § 92

The agreement before us provides for pension contributions by the employer which are, at least in part, based not on a specific rate of contribution, but on an agreed level of benefits for which employees will be eligible.

## § 93

In the wage review of June 16, 1963 (which was to have been limited to increases not to exceed 3½% of base wages), AMA and MEBA concluded an agreement under which pension benefits were increased to \$300 per month. . . .

These benefits represent a huge potential liability to the employers, inasmuch as the benefit plan so established is largely unfunded by past contributions.

## § 94

Indeed, at page 24 of the "MEBA Pension Trust—Actuarial Valuation and Review for the Year Ended December 31, 1961—June, 1963," submitted by AMMI, it is indicated that a guaranteed pension of \$300 per month would impose on the employers an unfunded accrued liability slightly in excess of \$85,000,000. . . .

## § 95

. . . [B]ecause of the enormous unfunded liability of the employers, it appears certain that these contributions will be greatly increased in the future.

## § 96

Not only are pension benefits of \$300 monthly with 20 years of service (regardless of age) very expensive for the employer, they are also considerably in excess of the benefits which workers in other industries are now provided.

\* \* \*

The Pension Plan of MEBA is unique among those listed in the above table in that there is no minimum age requirement.

\* \* \*

The above considerations are necessarily relevant to the Board's determination of what constitutes a subsidizable pension plan.

\* \* \*

§ 97

The operators are therefore called upon to submit to the Board for its review, not later than September 30, 1965, a pension plan which takes into consideration the matters discussed above, and which, on the basis of sound actuarial calculation, can be shown to involve employers' contributions which, together with other wage costs, do not exceed acceptable limits in the light of the Presidential guideline.

§ 98

The Board wishes to reemphasize that its subsidization of contributions to pension funds will be limited on a contribution basis as indicated, and that the operators should exercise some care and caution in accepting pension agreement terms that may create substantial unsubsidized obligations in the future.

§ 99

We will consequently approve as eligible for subsidy only those contributions which, supported by a thorough actuarial study, approved by the Board, are found to be required to fund such a plan.

*Opinion and Order of the Secretary of Commerce, Maritime Subsidy Board Dockets A-14; A-15; and A-16, July 23, 1965, (Vessels' Exhibit D, 7-8).*

§ 100

It is relevant to consider in each case any current general guideline such as that contained in the 1965 Economic Report of the President [transmitting the Annual Report of the Council of Economic Advisers], which is "That general guide for wages is that the percentage increases *in total employee compensation* per man-hour be equal to the national trend rate of increase in output per man-hour". [1965 Report, p. 108] [Emphasis added]

NO. 21729

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT NORMAN PEDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

FILED

OCT 5 1967

WM. B. LUCK, CLERK

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NO. 21729

IN THE UNITED STATES COURT OF APPEALS  
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ROBERT NORMAN PEDERSON,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

JURISDICTIONAL STATEMENT

Appellant, Robert Norman Pederson and co-defendant Jerry Wayne Clark, were indicted by the Federal Grand Jury for the Southern District of California, Central Division, on August 17, 1966 in case No. 36536. The indictment is in four counts. Count One charges appellant and co-defendant with conspiracy to smuggle goods into the United States in violation of 18 U.S.C. §371; Count Two charges appellant and co-defendant with the receipt, concealment and facilitation of the receipt and concealment of amphetamine tablets and barbiturate pills in violation of 18 U.S.C. §545. Counts Three and Four charge appellant and co-defendant with the possession of "stimulant or depressant drugs" in violation of 21 U.S.C.,



§331(q)(3) and §360a(c) [C. T. 2]. 1/

On August 23, 1966 appellant was arraigned in case No. 36536 before the Honorable Charles H. Carr, United States District Judge. Appellant entered a plea of not guilty to all counts of the indictment and the trial of the case was transferred to the Honorable Walter E. Craig, United States Judge, sitting in Los Angeles by designation. On the same date a jury was impanelled [R. T. 2-8] 2/ and appellant's Motion to Suppress Evidence was heard and denied by the court [R. T. 10-46]. On August 24, 1966 appellant's Motion to Dismiss the Indictment was heard and denied by the court [R. T. 47-53], and jury trial of case No. 36536 commenced [R. T. 53]. Appellant was represented by counsel at all stages of the proceedings.

On August 26, 1966 appellant was found guilty by jury verdict of all counts of the indictment [R. T. 259-261]. On September 13, 1966, after a pre-sentence investigation and report, appellant was sentenced to the custody of the Attorney General or his authorized representative for a term of five years on Counts One and Two and one year on Counts Three and Four, said sentences to run concurrently [C. T. 53].

On September 14, 1966 a timely notice of appeal was filed by appellant [C. T. 54].

The District Court had jurisdiction by virtue of Title 18, U. S. C. §§3231, 371 and 545 and Title 21, U. S. C. §§333(a), 331(q)(3),

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1/ "C. T. " refers to Clerk's Transcript of Record.

2/ "R. T. " refers to Reporter's Transcript of Record.





360a(c), 321(v)(1), and 321(v)(2). This Court has jurisdiction to entertain this appeal under the provisions of Title 28, U.S.C. §§1291 and 1294.

## II

### STATUTES INVOLVED

Title 18, United States Code, Section 371 provides as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both. . . . "

Title 18, United States Code, Section 545 provides as follows:

"Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the custom house any false, forged, or fraudulent invoice, or other document or paper; or

"Whoever fraudulently or knowingly imports or





brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law -

"Shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

"Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

"Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States. "

Title 21, Section 360a(c) provides:

" \* \* \*

"No person, other than a person described in subsection (a) or subsection (b)(2) of this section, shall possess any depressant or stimulant drug otherwise than (1) for the personal use of himself or of a member of his household, or (2) for administration to an animal owned by him or a member of his household. In any criminal



prosecution for possession of a depressant or stimulant drug in violation of this subsection (which is made a prohibited act by section 331(q)(3) of this title), the United States shall have the burden of proof that the possession involved does not come within the exceptions contained in clauses (1) and (2) of the preceding sentence.

" \* \* \* "

Title 21, Section 321 provides in part:

" \* \* \*

"(v) The term 'depressant or stimulant drug' means -

"(1) any drug which contained any quantity of (A) barbituric acid or any of the salts of barbituric acid; or (B) any derivative of barbituric acid which has been designated by the Secretary under section 352(d) of this title as habit forming;

"(2) any drug which contains any quantity of (A) amphetamine or any of its optical isomers; (B) any salt of amphetamine or any salt of an optical isomer or amphetamine; or (C) any substance which the Secretary, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; . . .

" \* \* \* "





Title 21, Section 331q(3) prohibits:

" . . . the possession of a drug in violation of section 360a(c) of this title. . . . "

" \* \* \* "

Title 21, Section 333(a) provides in part:

"Any person who violates any of the provisions of section 331 of this title shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; . . . "

### III

#### STATEMENT OF FACTS

In the later part of May, 1966, Customs Agent David F. Burnett, San Ysidro, California, was contacted by a previously reliable informan [R. T. 57], who stated he had been hired by an unidentified male Mexican adult to drive a 1955 Mercury, California License No. GIX 090, equipped with a gasoline tank with a false compartment containing pills, from Tijuana, Mexico, to a Sam's Restaurant on Pacific Coast Highway in Huntington Beach, California. The informant's instructions were to park the 1955 Mercury in the parking lot of the restaurant, to into the restaurant, wait one hour and then come out and look in the Mercury where he would find \$100 [R. T. 144-145]. The informant was advised by Customs agents.





to adhere to the instructions given him by the stranger in Tijuana, Mexico [R. T. 59, 67-68].

On May 31, 1966, at 1:25 p. m. , Customs Agent Burnett observed the 1955 Mercury, California License No. GIX 090, driven by the informant, enter the United States through the Port of San Ysidro, California [R. T. 58, 64]. Constant surveillance on the 1955 Mercury was maintained as it proceeded north to the vicinity of Pacific Coast Highway and Warner Avenue, Huntington Beach, California. Approximately 10 miles north of San Diego, Agent Burnett inspected the Mercury by kicking the gas tank and he stated that he "could hear a rattle, which appeared to me to be pills or some small articles. " [R. T. 58-59]. Along the way the Mercury stopped for gas every 35 to 50 miles [R. T. 61]. At San Clemente the Mercury was placed on a hoist and the gas tank was again inspected. Agent Burnett again heard the rattle of pills [R. T. 60]. Customs Agents maintained surveillance on the 1955 Mercury as it was driven to and parked in the parking lot of Sam's Restaurant, Pacific Coast Highway, Huntington Beach, California. This was at approximately 5:25 p. m. on May 31, 1966. The informant then got out and went into the restaurant [R. T. 60-62].

At approximately 5:35 p. m. Agents Watson and Diaz observed a white Ford Ranchero, California License No. NWG 629, drive by Sam's Restaurant traveling south. The two occupants parked across the street and went into the "Chicken Coop" Restaurant. The driver was appellant Robert Pederson and the passenger was co-defendant Jerry Wayne Clark [R. T. 72-74]. The two



occupants of the Ford Ranchero came out of the Chicken Coop Restaurant and drove north on Pacific Coast Highway. The Ford Ranchero was next observed traveling south on Pacific Coast Highway [R. T. 76] and then north again on Pacific Coast Highway [R. T. 78].

At approximately 6:30 p. m. the 1962 Ford Ranchero truck, driven by appellant, returned and drove alongside the 1955 Mercury and stopped. The passenger, co-defendant Clark, got out of the truck, and got into the 1955 Mercury and drove it away. Appellant followed closely in the 1962 Ford Ranchero [R. T. 82, 95]. Customs Agents continued to maintain surveillance of both vehicles until they came to the intersection of Warner and Pacific Coast Highway. Here appellant, in the 1962 Ranchero, continued south on Pacific Coast Highway, and co-defendant Clark turned left on Warner [R. T. 83]. Customs Agents continued to maintain surveillance of Clark in the 1955 Mercury, while other agents maintained surveillance of the 1962 Ford Ranchero. When it became apparent that both drivers were aware they were being followed, they began to take evasive tactics [R. T. 91-92, 95-96, 100]. The 1955 Mercury was at Warner and Fairview in Santa Ana, California, and the 1962 Ford Ranchero was at Del Mar and Tustin Avenue in Costa Mesa, California when they were stopped and arrested. The Ford Ranchero driven by appellant had taken a parallel route, headed in the same direction as the Mercury driven by co-defendant Clark [Gov'ts. Exhibit No. 2].

On May 31, 1966, an examination was made of the 1955





Mercury, California License No. GIX 090. The vehicle's gasoline tank was removed and contained therein were approximately 100,100 white amphetamine sulfate tablets and 486 red barbiturate capsules [R. T. 87, 97, 98, 104, 109].

The 1955 Mercury, California License No. GIX 090, was registered to James E. or Tina Heintz, 15717 Brighton Street, Apartment B, Gardena, California [Govt. Exhibit No. 6]. Mr. & Mrs. Heintz stated they sold the auto approximately in July, 1965 for cash to two men. They identified co-defendant Clark as one of the men who bought the auto and appellant Pederson was the other; however, they were not positive [R. T. 113-126, 127-134]. Apartment B, 15717 Brighton Street, Gardena, California, was appellant Pederson's mother's residence and appellant is the landlord of that apartment house [R. T. 140].

#### IV

#### ERRORS SPECIFIED BY APPELLANT

Appellant has specified the following points on appeal: 3/

1. The evidence of appellant's guilt on all four counts was entirely circumstantial and insufficient to permit the jury to try the case, since the corpus delicti of the indictment offenses was not established as to appellant, and the trial court's denial of appellant's motion for acquittal thereby was reversible error.

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3/ Appellant's Op. Br. pp. 8-9.





2. The record is devoid of sufficient evidence to establish a corpus delicti of the indictment offenses, in that the only person crossing the border with concealed narcotics was a paid informant, all of whose acts were known to and controlled by federal customs agents; any pre-existing conspiracy to defraud the United States was therefore terminated, as a matter of law, before the informant, Gonzalez, entered the United States.

## V

### ARGUMENT

#### A. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANT.

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In a criminal case, evidence upon appeal is viewed in the light most favorable to the Government.

Hiram v. United States, 354 F.2d 4, 7  
(9th Cir. 1965);

Stein v. United States, 337 F.2d 14, 16  
(9th Cir. 1964).

This rule also includes all inferences to be drawn from the evidence.

Yeargain v. United States, 314 F.2d 881, 882  
(9th Cir. 1963).

The evidence presented by the Government and pointing to appellant's guilt was not entirely circumstantial as appellant would have this Court believe (Appellant's Opening Brief, p. 8), and briefly is as follows:



1. In May 1966 a reliable informant was contacted in Mexico and hired to drive a car from Tijuana, Mexico to Huntington Beach, California.

2. The vehicle was equipped with a compartment in the gasoline tank containing pills.

3. This vehicle was sold to the co-defendant and another individual, possibly appellant, in July 1965.

4. At the time it was sold, the vehicle did not have a special compartment in the gasoline tank.

5. On May 31, 1966 this vehicle crossed the border into the United States and arrived at its destination as per instructions.

6. About ten minutes after its arrival appellant drove his vehicle by the place where the load vehicle was parked.

7. Appellant drove back and forth past the location of the load vehicle.

8. Appellant then stopped next to the load vehicle and the co-defendant got into the load vehicle and drove away with appellant following.

9. Thereafter appellant took a different road heading in the same direction as the load vehicle.

10. Thereafter appellant began to take evasive action when he presumably noticed that he was being followed.

11. The load vehicle, although sold in July, 1965, was still registered to the sellers with the only change being that the address was that of appellant's apartment house.

The evidence outlined above was both direct and circum-





stantial and certainly adequate to permit the jury to determine the guilt of the appellant. The jury, as the trier of fact, was not limited to the bald statements of the witnesses. On the contrary, the jury properly drew reasonable inferences from the facts presented.

The guilt of the appellant was properly established without proof that he personally did every act constituting the offense charged.

Pereira v. United States, 347 U.S. 1 (1954);

Nye & Nisson v. United States, 336 U.S. 613 (1949).

As the case comes before this Court, the sole issue relating to the sufficiency of the proof is whether "there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." A verdict supported by sufficient evidence is binding on a reviewing court.

United States v. Socony Vacuum Oil Co., Inc.,

310 U.S. 150, 254 (1940).

As stated in Glasser v. United States, 315 U.S. 60, 80 (1942):

"It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. United States v. Manton, 107 F.2d 834, 849 and cases cited. Participation in a criminal conspiracy need not be proved by direct evidence; a





common purpose and plan may be inferred from a  
'development and a collocation of circumstances.'

United States v. Morton, supra. " [Emphasis added].

Harney v. United States, 306 F.2d 523, 530

(1st Cir. 1962), cert. denied 371 U.S. 911.

It is submitted that the evidence which the jury believed not only amply supports, but in fact compels, the verdict which the jury returned.

B. A CONSPIRACY WAS ESTABLISHED  
NOTWITHSTANDING THE PARTICIPA-  
TION OF GOVERNMENT AGENTS.

---

A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. The evidence in this case established that appellant was an active member of the conspiracy alleged and as such tacitly, if not positively, in some way or manner, or through some contrivance, came to a mutual understanding to try to accomplish a common and unlawful plan, i. e., smuggle pills into the United States.

Cf. United States v. Aviles, 274 F.2d 179

(2nd Cir. 1960);

Dennis v. United States, 302 F.2d 5 (10 Cir. 1962).

The success or failure of the conspiracy to accomplish the common object or purpose is immaterial since a conspiracy is a crime even though the contemplated offense may never be



consummated.

Harney v. United States, supra, at 531.

In the present case appellant contends that conspiracy to smuggle pills was not established because Government agents were aware of the illegal importation and in fact permitted it and therefore the act of smuggling did not occur. The record is clear that the informant contacted the agents after his initial contact with the stranger in Mexico and after he was hired to drive the load vehicle to the United States. At all times the informant was advised by the Government agents to adhere to the instructions previously given him by the stranger in Mexico. To require immediate seizure of the contraband upon discovery would deprive federal officers of a most effective method of obtaining evidence against ultimate consignees, clearly a result contrary to congressional intent.

United States v. Davis, 272 F.2d 149, 153

(5th Cir. 1959).

Appellant further contends that it is not an offense for a Government agent to transport narcotics into the United States. Appellant cites no statute, regulation or law which authorizes government agents to import narcotics for purposes of subsequent criminal prosecution. Participation of a Government informant obviously does not negative the illegality of the importation. In transporting the 1955 Mercury from Tijuana, Mexico, to Huntington Beach, California, the informant was an employee of the stranger in Mexico and the co-conspirator who were to pay him in the United States. His role as an informant consisted only of assisting the





officers in the discovery of the illegally imported pills, and the apprehension of the intended recipients.

The argument made by appellant was rejected by the United States Court of Appeals for the Fifth Circuit in Haynes v. United States, 319 F.2d 620 (1963). As described by the court:

"The theory of the appellants is that since the proof established that the marihuana was brought from Mexico by a government informer, one Juan Sanchez, and his bringing it in was assisted by government agents, it could not be held that it was unlawfully brought in for the reason that, under the statute, it is not an offense for a government agent to bring marihuana into the United States, and further that since, under federal law, government agents are not required to pay any tax on marihuana, there was no violation of either the smuggling statute or the transferee statute." 319 F.2d at 621-622.

In rejecting this theory, the court concluded:

"As we see it, though the defendants in this argument pile Pelion on Ossa to deprive the case of legal substance by making it appear that there was no violation by the defendants but by the government itself, the facts, looked at in their reality and sequence, show that the commission of the offenses, as to which the appellants were convicted, is clearly and thoroughly established. . . . " 319 F.2d at 622.





## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gabriel A. Gutierrez

GABRIEL A. GUTIERREZ



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IN THE  
United States Court of Appeals  
FOR THE NINTH CIRCUIT

LOUIE VALENZUELA-HERNANDEZ  
and  
SOFIA DANIELS VALENZUELA,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

No. 21734 ✓  
No. 21734-A

On Appeal from the Judgment of  
The United States District Court  
For the District of Arizona

---

**BRIEF FOR APPELLEE**

---

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**FILED**

SEP 1 1967

WM. B. LUCK, CLERK



SEP 1 1967





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**IN THE  
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No. 21734

No. 21734-A

On Appeal from the Judgment of  
The United States District Court  
For the District of Arizona

**BRIEF FOR APPELLEE**

**I.**

**JURISDICTIONAL STATEMENT OF FACTS**

On September 13, 1966, an Indictment was returned by the Federal Grand Jury sitting at Tucson, Arizona. (Item 24 of the Clerk's Record of the Transcript on Appeal, Volume I.) (Hereinafter Volume I will be referred to as "RC", the reporter's transcript will be referred to as "RT", the number following will refer to the page, and the number following "L" will refer to the number of the line. The Appellant, Louie

Valenzuela-Hernandez, will be referred to as Mr. Valenzuela, and the Appellant, Sofia Daniels Valenzuela, will be referred to as Mrs. Valenzuela.)

The Indictment charged that on or about September 2, 1966, Mr. and Mrs. Valenzuela, within the District of Arizona, did knowingly and with intent to defraud the United States of America, import and bring into the United States of America from the United States of Mexico, at Nogales, Arizona, approximately seven pounds and twelve ounces of marihuana, and approximately eight marihuana cigarettes, contrary to law, in violation of 21 U.S.C.A. § 176a.

Mr. and Mrs. Valenzuela's arraignment was continued at their request from September 19, 1966, to October 3, 1966, at which time Manuel H. Garcia was appointed attorney for them. (RC Items 2 and 3.) Both pled not guilty (RC Item 24). Trial was set for November 22, 1966, and then continued to November 29, 1966 (RC Item 24). On October 24, 1966, their counsel moved for change of attorney for Mr. Valenzuela (RC Item 24), and on October 31, 1966, Ralph Seefeldt was appointed for Mr. Valenzuela (RC Item 4).

On November 29, 1966, Mrs. Valenzuela was ill and could not appear for trial. Mr. Valenzuela requested a continuance of his trial as well (RC Item 24).

On December 22 and 23, 1966, a trial of Mr. and Mrs. Valenzuela before a jury was held and the jury returned a verdict of guilty as to both Mr. and Mrs. Valenzuela (RC Items 6 & 7).

On December 30, 1966, both Mr. and Mrs. Valenzuela filed a Motion for New Trial based on the Trial Court's resentencing three defendants not connected with this case who were convicted of illegal re-entry (8 U.S.C.A., §1326), in the presence of the jury trial (RC Item 11).

On January 6, 1967, the Government filed its Memorandum in Opposition (RC Item 12).

On January 17, 1967, the Court denied the Motion for New Trial and sentenced Mr. and Mrs. Valenzuela to five years (RC Items 13 and 14).

On January 20, 1967, both Mr. and Mrs. Valenzuela petitioned the Court to appeal in forma pauperis, and the Court, on January 27, 1967, entered Orders granting the petitions (RC Items 17, 18, 19 and 20).

On January 24, 1967, Mr. Valenzuela's counsel filed a Motion to withdraw as counsel (RC Item 17). On January 27, 1967, Mr. Valenzuela filed his Notice of Appeal (RC Item 21), and on January 30, 1967, Mrs. Valenzuela filed her Notice of Appeal (RC Item 22).

This Court has jurisdiction of the appeal. 28 U.S.C.A., §1291.

## **II.**

### **STATEMENT OF FACTS**

On September 2, 1966, early in the morning, about 12:30 a.m., Customs Agents Horace Cavitt and Henry Washington were driving in Nogales, Sonora, Mexico and saw a white Corvette automobile parked in a well lighted area of Campillo Street about one block West from Calle Obregon (RT 99). The Corvette had two occupants who were later identified as Mr. and Mrs. Valenzuela (RT 99). Customs Agent Cavitt saw Jesus Gradillas, a Mexican taxicab driver and a narcotics dealer, near the Corvette (RT 100-103).

The Agents drove past the car and went South on Calle Obregon; they radioed to have a look-out posted on the Border (RT 103). They returned to the area, and the Corvette was still parked there, but was empty and no one was near it (RT 103 L 13-24). They drove around the block and the



Corvette then had three passengers and was moving; the occupants were Mr. and Mrs. Valenzuela and a man known to the agents as Tito, who is known as a narcotics dealer (RT 104 L 1-8). The Corvette was headed South on Calle Obregon (RT 105 L 9).

At about 1:30 a.m. the Corvette sought entry into the United States of America at the Grand Avenue port of entry with Mr. and Mrs. Valenzuela as sole occupants (RT 34 and 105). Customs Inspector Albert Alvarez took their entry. They both stated they had nothing to declare except a few small items (RT 35 L 5-6, and 37). A search was made of the vehicle by Customs Agents (RT 35 L 16-20). Seven pounds and twelve ounces of marihuana were found in the right front kick panel, and eight marihuana cigarettes were found under the driver's seat (RT 49). (The chain of custody and the testimony of the chemist will not be set out since there was no issue raised as to this evidence.)

The Defendants' case consisted of the testimony of Mr. and Mrs. Valenzuela. Mrs. Valenzuela testified they drove down to Nogales, Sonora, Mexico the afternoon of September 1, 1966 (RT 173). They stopped for toys and medicine and to meet with a bartender they had met twice before (RT 174), and then drove to the Amado Greyhound Park and remained there from about 8:15 p.m. until about 11:30 or 12:00 p.m. (RT 173). They returned to Nogales, Sonora, to the La Frotita Bar on Campillo Street and met Hector, the bartender, there (RT 176). She went out to the car and sat and read a magazine (RT 177-178). Her husband came out and moved the car across the street (RT 178-179). They both returned to the bar and had something to eat (RT 179). The bartender asked them for a ride home and they gave him one (RT 179-180). His home was up the street on which they were parked, i.e., Campillo Street; they did not drive on Calle Obregon (RT 179-180).

Mrs. Valenzuela testified that while she sat in the car reading a magazine, a taxi driver asked her about the wheels on their car (RT 181 L 1-5).

She testified that they declared the toys and vest, and forgot to declare a watch her husband had bought (RT 182-183).

On cross-examination she testified the Corvette was purchased by her husband for \$2400.00 and that he worked at a car wash (RT 190). When shown the title to the car she stated the financing brought the cost of the car up to \$3000.00 (RT 191).

She stated the purpose of returning to Nogales, Sonora was to sell Hector, the bartender, a portable record player (RT 192) for \$10.00 (RT 200). She said that the bartender wanted them to keep it since he had no place to keep it, although it was the size of a hair dryer (RT 193). She testified Amado is 22 miles from Nogales (RT 193).

She was asked the route they drove the bartender to his home and if it took forty-five minutes. She stated it did not (RT 199).

Mr. Valenzuela testified he had worked as a car wiper and at pumping gas at a car wash in Phoenix for the last two and one-half years (RT 202). He purchased the car for \$500.00 down and the balance was for \$2900.00 plus interest (RT 203). He purchased the racing wheels from a customer (RT 204). He stated he heard his wife's testimony and that it was true (RT 205). He described the search at the border (RT 205-211).

On cross-examination he was asked how long had he known the bartender, and he replied "about a day" (RT 212 L 5-6), and that he had not been to Nogales before September 1, 1966 (RT 212 L 12-15). He testified they went to the Frotita Bar to eat and the bartender came up to them and



introduced himself and asked to buy a record player (RT 214 L 1-26). He stated they made the return trip from Amado to Nogales, an extra forty-four miles, to keep the record player safe for the bartender (RT 220). On re-direct he testified the right-hand window of the Corvette could not be closed (RT 221).

### **III.**

#### **OPPOSITION TO THE SPECIFICATION OF ERRORS RELIED ON**

1. There was no prejudice to the rights of Appellants in the modification of the sentences of the three defendants not connected with this case in the presence of the jury panel.

2. There was no error in the admission of the testimony of Horace Cavitt.

3. There was no failure of proof of non-payment of import duty.

4. The search of Appellants' vehicle at the port of entry was not unreasonable and was not in violation of the Fourth Amendment.

5. There was sufficient evidence against both Appellants, and the Trial Court did not err in submitting the case to the jury.

### **IV.**

#### **SUMMARY OF ARGUMENT**

1. There is nothing in the record to show the trial jurors were affected by the modification of the sentences of the three defendants not connected with this case.

2. The testimony of Horace Cavitt was material and competent testimony.



3. All of the elements of the offense were established by circumstantial evidence and direct evidence.

4. The search of Appellants' vehicle constituted a Border Search and therefore could be based on mere suspicion.

5. The Government's evidence, combined with the testimony of the Appellants, was sufficient evidence upon which to return a verdict of guilty.

## V.

### ARGUMENT

**1. There is nothing in the record to show the trial jurors were affected by the modification of the sentences of the three defendants not connected with this case.**

Both Appellants argue that the jury was affected by the Trial Court's having modified the sentences of three defendants for violations of 8 U.S.C.A., §1326, illegal re-entry. The Court placed them on probation.

They assume the trial jurors would return a verdict not based solely on the evidence as instructed (RT 264).

The Court, in considering the modification of sentence, stated:

"THE COURT: But, since sentencing you, I have been troubled and I have still been thinking about you, you three men and the sentence that was given to you. You have not stolen any automobiles, as far as I know, and you have not stabbed anybody or brought narcotics into the country or anything of that nature."

(Partial Transcript of Proceedings, P 6, L 1-6)

Both Appellants argued that this statement could lead the jury to believe the Trial Court thought the Appellants were guilty. Just how this statement could lead the jury to believe

that is not clear. This sentencing occurred at the morning recess of the first day (RT 30), and the jurors were told they could leave or remain (RT 30 L 15-18).

In *Braswell v. United States*, (5th Cir., 1952), 200 F.2d 597, as cited by Appellant Louie Valenzuela-Hernandez, that Circuit, at page 602, held that if acts are "within the range of a reasonable possibility" of affecting the jury then there must be a reversal.

It is respectfully submitted it cannot be reasonably inferred that the jury would be influenced by the Court's comment beyond the inference that the charge of importing narcotics (marihuana is a dangerous drug and not a narcotic) is a serious offense.

## **2. The testimony of Horace Cavitt was material and competent testimony.**

At the trial Customs Agent-in-Charge Charles Cameron (RT 80-97) was called to testify prior to Horace Cavitt (RT 97-122). On the cross-examination of Cameron, Mr. Valenzuela's attorney asked if Cameron had personal knowledge of an innocent person having had marihuana placed in his automobile for transportation into the United States (RT 93 L 13-21). Direct examination was re-opened and Mr. Cameron testified to receiving a radio communication from Horace Cavitt, and as a result placing a "look-out" at the port of entry for a vehicle with a description of the two occupants, but with no license number (RT 95). On cross-examination Mr. Valenzuela's attorney asked how much he paid informants. There was no informant in the case (RT 96-97).

The testimony of Horace Cavitt as to who Jesus Gradillas was, was objected to as hearsay and the Court permitted it to stand as evidence as to the state of mind for the placing of the look-out on the occupants and the vehicle (RT 101



L 21 to 102 L 2). (The selling of narcotics by Jesus was of his own knowledge RT 111 L 19-24.)

Counsel cites the Court's ruling in denying Appellants' Motions for Judgment of Acquittal, but does not state it all:

". . . Now, isn't that a prima facie case with respect to both of them? No, we don't know how they got the marijuana. Could not the jury infer that they did it together unless they, by their defense show that, cast a doubt on the natural assumption that a jury would make, or could make, particularly if we add to the fact that they were both in the company of, at one time or another, two different men who were at least suspicious characters.

"Now, there is no evidence that they got the marijuana from these men. We don't know where they got it or whether or not they got it, except for the fact that it was in the automobile that they brought into the country; and I think that's all we know. But it seems to me that a prima facie case has been shown that calls for these people to come forward and either tell how the marijuana got into the car or show circumstances under which it could be inferred someone, without their knowledge, put it in. When you have the problem that Miss Diamos brought out, people are not usually going to stow valuable marijuana in somebody else's car without their knowing about it." (RT 165 L 1-19)

The Government did not argue what Horace Cavitt saw, except *the time* he saw them driving South and Appellant Louie Valenzuela's time of crossing, i.e., 12:30 a.m. (RT 247 L 11-17).

In *Jones v. United States*, (D.C. Cir., 1962), 296 F.2d 398, the United States Attorney offered the evidence that the defendant, who was charged with first degree murder and who was offering the defense of insanity, stated at the time of his arrest he wanted a cigarette and to see an attorney. The



U.S. Attorney stated the purpose of this evidence was to show his sanity. In the argument the U.S. Attorney argued these facts as evidence of his coolness and premeditation.

Appellant Sofia Valenzuela's counsel argued that the testimony of Cavitt does not establish that they are narcotic peddlers (RT 240).

The Court, at the beginning of its instruction to the jury, stated:

"THE COURT: Ladies and gentlemen of the jury, it now becomes my responsibility to give you the instructions that shall govern your deliberations. Before doing so, I might say, the Court has the prerogative as to the commenting upon the evidence. I seldom do this, but I do want to make one comment, particularly in view of some of the testimony yesterday. There was testimony by one of the agents as to the reason why he sent in this alert to check at the border, namely that he had seen the automobile here concerned and people they recognized as the defendants talking to one man first and then riding with another man, and he testified as to what he understood or what information he had indicated that these men were in some manner connected with narcotics. That testimony was admitted, not in any sense to prove that the two men concerned were narcotics peddlers or users or had anything to do with narcotics whatever, but rather because it was suspicion that their presence created in this agent's mind. In other words, that the agent had information to him indicating that these were narcotics peddlers. However, there is no proof whatever in this case that these two men, with whom these defendants were seen, actually were narcotics peddlers. That being the case, there is no proof in this case as to where the defendants got the marijuana if they did get the marihuana and if they did know it was in the car. This

is a matter for you to determine. The only comment I wish to make is that you must not conclude from any testimony in this case that it has been affirmatively proved that the men that were testified to having been in the company of these defendants actually were narcotics dealers.” (RT 262 L 4 to 263 L 6)

It is respectfully submitted that the jury was instructed at the time the evidence was admitted and at the beginning of the Court’s instruction as to the purpose of the admission.

**3. All of the elements of the offense were established by circumstantial evidence and direct evidence.**

Appellant Louie Valenzuela-Hernandez argues that the Government failed to prove that the Appellants did not have a license to import the marihuana and were never given the opportunity to show they had a permit.

The Government’s evidence showed recovery of the bulk marihuana in the right front kick panel of the Corvette and the marihuana cigarettes under the driver’s seat of the Corvette. There was sufficient circumstantial evidence of the possession of both Appellants. They were last seen headed South forty-five minutes before they attempted to enter the United States of America.

21 U.S.C.A., §176a, provides in part:

“... Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.”

In *Butler v. United States*, (9th Cir., 1959), 273 F.2d 436, this Circuit stated at pages 438-439:



" . . . There would be no purpose in creating such an evidentiary rule were it applicable only to marihuana proved to have been imported illegally. We refuse to follow Appellants' attempted distinction."

See also *Anthony v. United States*, (9th Cir., 1964), 331 F.2d 687, wherein this Court had before it a denial of a 2255 motion (28 U.S.C.A., §2255), which denial had upheld a conviction under 21 U.S.C.A., §176a based on constructive possession.

In the instant case neither Appellant declared the marihuana. Both Appellants took the stand and had the opportunity to explain the possession to the satisfaction of the jury. Their explanation was that they did not know the marihuana was in the car.

It is respectfully submitted there was sufficient evidence of the importation of the marihuana contrary to law as well as the other elements of the offense.

#### **4. The search of Appellants' vehicle constituted a Border Search and therefore could be based on mere suspicion.**

The search was conducted because of a "look-out" placed at the request of Horace Cavitt for what he saw in Nogales, Sonora, Mexico. It was not based on information from an informant.

Border searches may be based on mere suspicion. *Alexander v. United States*, (9th Cir., 1966), 362 F.2d 379, at p. 382. See also *Ernesto Gonzalez-Alonso and Jorge Gummersindo Valdelomar y Dorta v. United States of America*, (9th Cir., June 7, 1967), No. 21,462, at pages 4-5, of the slip sheet opinion for a resume of this Circuit's rulings.

It is respectfully submitted the border search was a valid search.



**5. The Government's evidence, combined with the testimony of the Appellants, was sufficient evidence upon which to return a verdict of guilty.**

Appellant Sofia Daniels Valenzuela argues there was not sufficient evidence as to her and that the Motion for Judgment of Acquittal should have been granted.

Since she offered evidence after the Government rested, she had abandoned her Motion made at the close of the Government's case. *Colella v. United States*, (1st Cir., 1966), 360 F.2d 792.

There was evidence of a joint operation. They were seen together in Nogales, Sonora, Mexico; neither of them declared the marihuana; she testified to an unplausible story of selling a portable phonograph to a bartender in Nogales, Sonora, and keeping the phonograph, which was no larger than a hair dryer, because he had no place to put it; and returning from the Amado race track, 22 miles away, to drive him home (see Statement of Facts), and when asked would it take forty-five minutes to drive the bartender home two miles away, she replied "No" (RT 198-199). She had no explanation for the forty-five minutes.

"The Government's circumstantial evidence, combined with Appellant's false statements to Government agents, made a sufficient case for the jury."

*Miguel Lamenca, Joseph Santos and Pedro Meza-Bustamonte v. United States of America* (9th Cir., July 17, 1967), No. 21,044, 21,045, and 21,046, at page 1 of the slip sheet opinion.

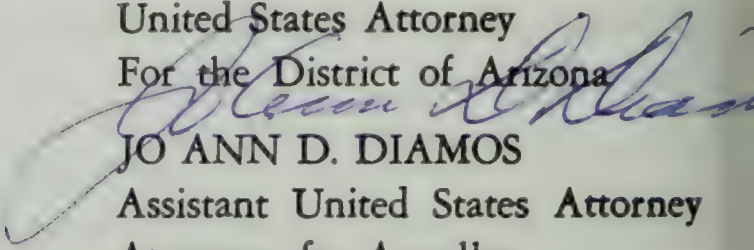
It is respectfully submitted there was sufficient evidence to find Appellants guilty of the charge.

## VI. CONCLUSION

There was sufficient evidence of the offense to find both Appellants guilty, and the marihuana was seized as a result of a border search, and there was no prejudice to the rights of the Appellants in the modification of the sentences of three other defendants, and the evidence of Horace Cavitt was admissible as to state of mind.

Respectfully submitted,  
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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

  
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Assistant United States Attorney

Three copies of the within Brief of Appellee mailed this  
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NO. 21737

In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

HONOLULU LUMBER CO., LTD.,  
Appellant,

vs.

AMERICAN FACTORS, LTD., CITY HILL  
CO., LTD., HAWAII BUILDERS SUPPLY  
CO., LTD., ISLAND LUMBER CO., LTD.,  
LEWERS & COOKE, LTD., MID PAC  
LUMBER CO., LTD., et al.,  
Appellees.

NO. 21737

Appellant's Opening Brief

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LEWERS & COOKE, LTD., MID PAC  
LUMBER CO., LTD., et al.,

Appellees.

Appellant's Opening Brief

STATEMENT OF JURISDICTION

This is an appeal from a final judgment in favor of the appellees rendered by the United States District Court for the District of Hawaii in an action by appellant under the anti-trust laws for treble damages and injunctive relief. (CT 388)<sup>1/</sup> Jurisdiction was based upon the provisions of 15 U.S.C. Sections 15 and 26 commonly known as the Sherman and Clayton Acts. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1291 and 1294. Notice of appeal was filed within thirty days after entry of judgment on September 12, 1966 and after Order Denying Motion to Vacate Withdrawal of Counsel and Order Denying Motion to

<sup>1/</sup> Parenthetic references preceded by "CT" are to the Clerk's Transcript of the record.





Vacate and Motion for Rehearing entered on September 27, 1966 (CT 418-423).

### STATEMENT OF THE CASE

#### A. The Nature of the Controversy

This is an action under the federal anti-trust laws for damages and injunctive relief brought by appellant (sometimes referred herein as plaintiff) against the appellees (sometimes referred to herein as defendants). The Complaint was filed November 30, 1961 (CT 1-14). At this time Louis B. Blissard was plaintiff's local counsel of record. On November 4, 1964, Louis B. Blissard withdrew as plaintiff's local counsel and Messrs. Shim, Naito and Oki (Alvin T. Shim and Yukio Naito) appeared in his place (CT 260-261). On November 13, 1964 a First Amended Complaint (hereinafter referred to as Complaint) was filed (CT 269-283), and Answers were subsequently filed thereto by each of the defendants (CT 314-341).

The Complaint alleges that the plaintiff Honolulu Lumber Co., Ltd. was engaged as a wholesaler and distributor of lumber products in Oahu, Hawaii, and that each of the defendant corporations was likewise engaged as a wholesaler and distributor of building materials in competition with it. Beginning in about July, 1950, defendants and each of them entered into certain contracts and agreements which were intended to prevent and had the result of preventing plaintiff from obtaining supplies of lumber products and selling them in competition with the defendants, thereby





causing damages to plaintiff's business in the sum of \$37,000.00 and estimated anticipated profits in the sum of \$73,000.00, or a total of \$110,000.00. The Complaint requested treble damages, in the sum of \$330,000.00, and injunctive relief.

After conducting extensive pretrial discovery by written interrogatories, appellant on about June 10, 1966 requested a trial date (CT 368).

On June 17, 1966 appellees noticed the taking of the deposition of plaintiff's president, Preston Low, for June 28, 1966 in Honolulu (CT 351). On June 22, 1966, 6 days prior to the scheduled time for the deposition, plaintiff's local attorney Alvin Shim wrote a letter to defendants' attorneys requesting a three months' continuance of the deposition and also of the scheduled trial for the reason that the firm was withdrawing as attorneys in this action (CT 352). Each of the appellees' attorneys received this letter, but none of them responded to it although so requested (CT 351).

On about June 24, 1966 appellant's local counsel of record, Messrs. Shim, Naito and Oki obtained an ex parte order without written notice to it, without its consent and without just cause shown, contrary to the Federal Rules of Civil Procedure, permitting said attorneys to withdraw as such counsel. Upon learning of this withdrawal appellant endeavored without success to secure new local counsel and was still attempting to do so at the time the action was dismissed (CT 365-370).





The action was set for pretrial on September 6, 1966, and the Clerk of the District Court so advised appellant by letter dated June 27, 1966. There was no mention of a trial date (CT 459a). The Clerk in this letter also advised appellant to comply with Rule 1(e) of the local District Court rules requiring participation by local counsel in the action.

Appellant's president Preston Low did not appear for his deposition on June 28, 1966 at the scheduled time and place under the belief that it had been continued. He was willing to have his deposition taken at a later date, but he heard nothing further from appellees until receipt of notice of their Motion to Dismiss on about August 26, 1966 (CT 347-356).

Appellant wrote the Clerk of the District Court by letter dated August 24, 1966 stating that appellant had been attempting to secure the services of other local counsel but had been unable so far to do so, and requesting continuance of the pretrial conference from September 6, 1966 to October 7, 1966 (CT 465).

On August 26, 1966 the Clerk wrote appellant that its request for a continuance of a pretrial date was denied and that the pre-trial would go on as scheduled. There was again no mention of a trial date nor of a hearing on September 2, 1966 on appellees' Motion to Dismiss filed the preceding day (CT 466).

Appellees filed a Motion to Dismiss on about August 25, 1966 pursuant to Rules 37(d) and 41(b) on the grounds that appellant had wilfully failed to appear for the taking of his duly noticed





deposition and that appellant's conduct in the action constituted a failure to prosecute. The hearing on the Motion to Dismiss was set for Friday, September 2, 1966, one court day prior to the date set for the pretrial conference, September 6, 1966 (CT 347-365). Appellant was under the mistaken belief that the hearing on the Motion to Dismiss would be held on the same date as that of the pretrial conference and accordingly filed no papers in opposition thereto until the following Tuesday, September the 6th (CT 377-380). Appellant's counsel wrote a letter to the Court dated September 2, 1966 again requesting that trial of the action be continued to the first week in November in order to afford appellant the further opportunity to secure the services of local counsel (CT 467-469). Appellant's counsel also sent a telegram to the Court from San Francisco on September 2, 1966 at 10:30 o'clock a.m. P.D.T. which presumably was received by the Court prior to the hearing on appellees' Motion to Dismiss at 2:30 p.m. that day H.S.T., stating that he would be unable to attend the pretrial conference the following Tuesday but was airmailing Plaintiff's Pretrial Statement, Memorandum and Affidavits (CT 466a).

Appellee prepared a pretrial statement and filed the same in time for the scheduled pretrial conference September 6, 1966 (CT 360-364).

Following entry of Order of Dismissal dismissing this action September 12, 1966 (CT 389) appellant first filed a Motion to Vacate Dismissal with Prejudice and Rehearing on Defendants'





Motion to Dismiss on about September 9, 1966 (CT 375-387) and subsequently on about September 23, 1966 filed a Motion to Vacate Withdrawal of Counsel and Reinstate Counsel of Record (CT 405-413) both of which Motions were denied by the Court on September 27, 1966 (CT 418-421).

Appellant was not represented at the hearing on the Motion to Dismiss September 2, 1966, or at the scheduled pretrial conference September 6, 1966 or at subsequent hearings on its Motion to Vacate Dismissal and on its Motion to Vacate Withdrawal of Counsel held September 20, 1966 and September 26, 1966 because of its inability to secure new local counsel as required by Rule 1(e) of the District Court local rules and because of the lack of finances to pay for travel expenses of its counsel from his office in San Francisco to Honolulu and return (CT 365-370).

Appellant filed his Notice of Appeal from the Judgment of Dismissal on October 12, 1966 (CT 425).

#### B. Questions Involved

1. Did the appellant through Preston Low, its president, willfully fail to appear for the taking of his duly noticed deposition?
2. Did the appellant fail to prosecute this action?
3. May an attorney of record withdraw as such attorney without notice and without cause where the effect is to leave a party without representation?

#### C. Specification of Errors

1. The District Court erred in dismissing this action on



the ground of the wilful failure of appellant to appear for deposition.

2. The District Court erred in dismissing this action for want of prosecution.

3. The District Court erred in denying appellant's Motion to Vacate and Motion for Rehearing.

4. The District Court erred in approving Withdrawal of Counsel.

5. The District Court erred in denying appellant's Motion to Vacate Withdrawal of Counsel.





## ARGUMENT

### I. THE DISTRICT COURT ERRED IN DISMISSING THIS ACTION ON THE GROUND OF THE WILFUL FAILURE OF APPELLANT TO APPEAR FOR DEPOSITION.

The record discloses that the appellant's president, Preston Low, resides in Menlo Park, California, and was in the offices of appellant's local counsel, Alvin Shim, in Honolulu on June 20, 1966 at which time Mr. Shim advised him of appellees' notice to take his deposition on June 28, 1966. Mr. Low advised Mr. Shim that he was on his way to Hong Kong on personal business and would not return until the following month, and requested Mr. Shim to obtain a continuance of the deposition until his return. Mr. Shim then wrote a letter to each of the appellees' counsel of record requesting a three-months' continuance on the ground that his firm was withdrawing as local counsel of record (CT 351-352, Exhibit A). Appellees made no response to this letter, although requested to do so. Appellant accordingly assumed the continuance had been granted (CT 365). The record further discloses that Mr. Low was willing to have his deposition taken by the appellees at any time in San Francisco or Honolulu, providing that he be given at least two-weeks' notice so as to arrange his business schedule (CT 365-367).

Under the foregoing circumstances, appellant submits that there was no failure to attend this deposition since Mr. Low had a legitimate reason for not being present, his local counsel had requested such continuance, and appellees by their failure to





reply to this request impliedly consented thereto. In any event, if there were a failure to attend the deposition, the failure was not wilful. Mr. Low had indicated to his local attorney that he would be willing to have his deposition taken at any time upon two-weeks' notice.

Appellees in their Statement of Reasons and Citation of Authorities in support of their Motion to Dismiss under Rule 37(d) stated that appellant's only excuse for not appearing at the deposition was that he needed time to secure a local attorney, and that from the record he had been informed of the need for retaining a new local attorney on March 10, 1966, referring to the Memorandum in Support of Withdrawal of Counsels filed June 24, 1966 (CT 353-355, 344-346). It is to be noted that the Memorandum referred to by Yukio Naito, Alvin T. Shim and Eichi Oki, appellant's local counsel, was not in affidavit form, and accordingly could not properly be considered by the Court in connection with this Motion. Even if considered, the Memorandum merely stated that Mr. Naito informed Mr. Tibbits of his withdrawal as counsel. It did not state that Messrs. Naito, Shim and Oki were all withdrawing as counsel, but only that Mr. Naito was going to withdraw. Mr. Tibbits in his affidavit stated that he understood that Mr. Shim would remain on in the capacity of appellant's local counsel, and that it was not until about June 21, 1966 or one week before the scheduled deposition that appellant's counsel had notice that Mr. Shim also was going to withdraw as local counsel. Even then he had no notice Mr. Oki would also withdraw. (CT 368-370).





Appellant should not be penalized for the failure of its local attorney to advise appellees' counsel of Mr. Low's business engagement which prevented him from having his deposition taken at the scheduled time and his willingness to have his deposition taken the following month, or at any time upon two-weeks' notice.

Maresco v. Lambert (ED NY 1941) 2 FRD 163.

In Maresco, a motion was made to strike the complaint and dismiss the action on the ground that the plaintiff had failed to submit to an examination pursuant to Rule 26 of the Federal Rules of Civil Procedure. It appeared that the plaintiff failed to attend the deposition due to his changing attorneys and a misunderstanding on the part of the new associate attorney. Judge Moscovitz in denying the motion stated:

"The excuse is rather lame, but the client should not suffer in this instance because of the lawyer's fault."

II. THE DISTRICT COURT ERRED IN DISMISSING THIS ACTION FOR WANT OF PROSECUTION.

The Complaint in this action was filed November 30, 1961.

Appellees then moved to dismiss the Complaint which motion was granted in part and denied in part. Appellant then served extensive interrogatories on Appellees which in due course were answered. An Order was entered dismissing the Complaint with leave to amend. Appellant then filed its First Amended Complaint on November 13, 1964 and Appellees filed their Answers thereto (CT 460-464). Appellant requested a trial date on June 10, 1966, and the action





was set for pretrial September 6, 1966. Appellant prepared and filed a pretrial memorandum and was ready to go to trial except that it was unable to secure the assistance of new local counsel as required by local rule 1(e) (CT 360-370).

From the date of withdrawal of Messrs. Naito, Shim and Oki on June 22, 1966 to the date of the hearing on Appellees' Motion to Dismiss September 2, 1966, Appellant made every effort to secure new local counsel. However, due to the complexities of an anti-trust action, the financial insolvency of Appellant which necessitated payment of new counsel on a contingency fee basis only, and the distance separating Appellant whose local offices had been closed in Honolulu and moved to Menlo Park, California, and Appellant's attorney whose office was in San Francisco, California, Appellant had been unable to secure new counsel by September 2, 1966. It had consulted with Walter Chuck, Esq. of Honolulu and was consulting with another local firm when the action was dismissed (CT 365-370).

Under these circumstances it is submitted Appellant was not dilatory in prosecuting its action, and it was an abuse of the District Court's discretion to have entered a dismissal on this ground.

Link v. Wabash R. Co., 370 US 626.

A) Failure to appear or to submit affidavits and other papers in opposition to Appellees' Motion to Dismiss at the hearing September 2, 1966 was by mistake.





From the Affidavit of its counsel Arthur H. Tibbits it is clear that counsel was not aware that Appellees' Motion to Dismiss was to be heard on September 2, 1966 but instead on September 6, 1966. This was due to the fact that under local District of Hawaii rules the time and place of the hearing on the Motion were not set forth in the first page as is done in the Northern District of California, but at the end of the Motion on the bottom page. This mistake is excusable, and the District Court was empowered by Federal Rules of Civil Procedure Rule 60(b) to relieve it of this mistake. Appellant availed itself of this corrective remedy in its Motion to Vacate Dismissal with Prejudice (CT 375-387).

Link v. Wabash R. Co. supra

Under Rule 60(b) of the Federal Rules of Civil Procedure, the District Court had the power to relieve a party or his legal representative from a final judgment or order or proceeding for mistake, inadvertency, surprise, or excusable neglect.

In the following Federal decisions, relief was granted under this Rule 60(b) for mistake, inadvertence, surprise or excusable neglect:

Weller v. Socony Vacuum Oil Co. of New York  
(SD NY 1941) 5 FR Serv 60.b.33, Case 3, 2FRD 158

(a judgment of dismissal where the failure to file a bill of particulars was due to the oversight or inadvertence of the clerk of plaintiff's attorney)

Soriano v. American Liberty Steamship Corp.  
(ED Pa 1952) 17 FR Serv 60.b.22, Case 1, 13 FRD 455

(a judgment of dismissal for want of prosecution occasioned by the inadvertence of plaintiff's counsel)





Wolfsohn v. Raab

(ED Pa 1951) 15 FR Serv 60b.24, Case 2, 11 FRD 254

(the defendant's attorneys' excusable miscalculation of time by one day)

Woods v. Severson

(D Neb 1948) 12 FR Serv 60b.24, Case 1, 9 FRD 84

(defendant's attempt to act as her own attorney and to her unfamiliarity with the formal requirements of an answer)

B) Appellant's failure to obtain new local counsel in conformity with local Rule I(e) within the time allotted did not constitute want of prosecution.

Rule I(e) of the United States District Court for the District of Hawaii became effective March 21, 1955, reads as follows:

"(e) Permission to Participate in a Particular Case.

Any member in good standing of the bar of any court of the United States or of the highest court of any state, but not an active member of the bar of this court, may, upon oral or written motion, be granted permission to participate in the conduct of a particular case in this court, but such motion shall be allowed only if such attorney associates with him an active member of the bar of this court, who shall at all times meaningfully participate in the preparation and trial of the case."

When Appellant instituted its action it was represented by local counsel, Louis B. Blissard. Subsequently on November 4, 1964 the firm of Shim and Naito was substituted for Blissard with the consent of Appellant (CT 260-261). On June 24, 1966, the firm





Shim & Naito obtained an ex parte order of the District Court without notice to it and without valid excuse or reason permitting it to withdraw from the action as Appellant's local counsel (CT 343). The order was not supported by affidavit but by an unsworn Memorandum (CT 344-346). Appellant never consented to this withdrawal, but made every effort to obtain other local counsel which proved unsuccessful up to the time of the dismissal of the action, and even at this time it was continuing its efforts to obtain new local counsel. After the action was dismissed for want of prosecution, Appellant moved the Court to vacate withdrawal of local counsel and reinstate the firm of Shim & Naito, which motion was denied. Had this motion been granted Appellant would have had local counsel and would have been able to proceed with its action. It submits that these facts do not constitute want of prosecution on its part.

Woodham v. American Cystoscope Company of Pelham, N.Y., CA5, 1964, 335 F2d 551.

III. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO VACATE WITHDRAWAL OF COUNSEL AND REINSTATE COUNSEL OF RECORD.

Following dismissal of this action Appellant moved to Vacate Withdrawal of Counsel and Reinstate Counsel of Record on the ground that such withdrawal had left it without local representation as required by Rule I(e) supra.

An attorney cannot unilaterally withdraw from representing a party to a pending action even if the Court approves, if the party is left thereby without representation [or, as in this case, local representation, as required by Rule 1(e)].





The proper and usual procedure is to file a Substitution of Attorneys consented to by both the old and new attorneys, and by the client, but, if the consent of the client is not obtainable, by a Court Order upon a written application or Motion therefor under Rules 6 and 7 of F.R.C.P. with notice to the client and for good cause shown. Messrs. Shim, Naito and Oki did not obtain appellant's prior consent to a Substitution of Attorneys. They made no written Motion supported by affidavit with notice to appellant as provided by Rule 6(d). All they did was to file a paper entitled "Withdrawal of Counsel" together with an unsworn Memorandum of Withdrawal of Counsel, which the Court approved.

This unilateral procedure is not in conformity with the F.R.C.P., and the Court below was in error, first in approving the Withdrawal of Counsel and second in not granting appellant's Motion to Vacate such withdrawal, particularly when the effect of such withdrawal was to leave the appellant without representation, i.e. in this case local representation.

Laskowitz vs. Shellenberger (S.D. Calif. 1952)  
107 F.Supp 397

7 Corpus Juris Secundum "Attorney and Client"  
§§120 and 121 and cases cited.

The Laskowitz case is directly in point. Here the Court refused to permit the withdrawal of attorneys for a corporate defendant where such withdrawal would have left the corporation without representation. The Court in its opinion stated in part:

"Said defendant consents to the withdrawal by a document bearing its seal filed with the Court.





The Court does not consent to the withdrawal of attorneys. Approval would leave a corporate defendant without representation. Even if a defendant assumes to represent himself, he must either enter his first appearance in the case in propria persona or be substituted for whoever appeared as his attorney. Defendant appropriately does not offer to do this because, being a corporation, it is without capacity to either represent others or itself.

\* \* \* \* \*

In any event a withdrawal of attorneys is not the proper course. A substitution of attorneys approved by the Court is the method of changing representation. The purported withdrawal of attorneys is disallowed."


#### CONCLUSION

Appellant urges this Court to reverse the judgment dismissing the action below on the ground that the Order permitting its local counsel to withdraw on the threshold of the trial was improper, leaving it without local representation as required by Local Rule 1(e) and excused it from attendance at later proceedings until it had obtained new local counsel or until its former counsel had been ordered reinstated.

It is respectfully submitted, for each of the reasons herein set forth, that judgment be reversed and the action remanded for further proceedings in the District Court with instructions to reinstate appellant's local counsel of record until new counsel may be secured.

Dated at San Francisco, California, this 13th day of November, 1967.

Respectfully submitted,

  
\_\_\_\_\_  
Arthur H. Tibbits  
Attorney for Appellant





CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

Arthur H. Tibbits  
Arthur H. Tibbits

CERTIFICATE OF MAILING

ARTHUR H. TIBBITS, Esquire, certifies that he is an active member of the State Bar of California and that his business address is 55 New Montgomery Street, San Francisco, California 94105; that he has served a copy of the attached Opening Brief of Appellant HONOLULU LUMBER CO., LTD. by placing a copy in an envelope addressed to the following persons at their office addresses as below:

Gilbert E. Cox, Esq.  
First National Bank Building  
Honolulu, Hawaii

Ralph T. Yamaguchi, Esq.  
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George L. T. Kerr, Esq.  
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Daniel H. Case, Esq.  
First National Bank Building  
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Alvin T. Shim, Yukio Naito and  
Eichi Oki  
Attorneys at Law  
446 Honolulu Merchandise Mart  
Building  
Honolulu, Hawaii

The envelopes were then sealed and postage fully prepaid and on November 13, 1967 were deposited in the United States mail at San Francisco, California.

Executed on November 13, 1967 at San Francisco, California.

Arthur H. Tibbits  
Arthur H. Tibbits





NO. 21737

In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

HONOLULU LUMBER CO., LTD.,

Appellant,

vs.

AMERICAN FACTORS, LTD., CITY MILL  
CO., LTD., HAWAII BUILDERS SUPPLY  
CO., LTD., ISLAND LUMBER CO., LTD.,  
LEWERS & COOKE, LTD., MID PAC  
LUMBER CO., LTD., et al.,

Appellees.

NO. 21737

Appellant's Reply Brief

FILED

FEB 5 1968

WM. B. LUCK, CLERK

Arthur H. Tibbits  
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California 94105

Attorney for Appellant



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NO. 21737

In the

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HONOLULU LUMBER CO., LTD., )

Appellant, )

vs. )

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CO., LTD., HAWAII BUILDERS SUPPLY )

CO., LTD., ISLAND LUMBER CO., LTD., )

LUMBER CO., LTD., et al., )

Appellees. )

NO. 21737

APPELLANT'S REPLY BRIEF

Appellant, HONOLULU LUMBER CO., LTD., is in receipt of Appellees' Answering Brief and replies thereto briefly as follows.

Introductory

Appellant does not agree with Appellees' statement as to the proper question presented on this appeal (Appellees' Answering Brief p. 6) viz:

"The proper question on appeal is whether the District Court abused its discretion in dismissing the action based upon the entire record and circumstances of the action, including the failure of Appellant to attend its disposition"(underscoring added)

Appellant submits that the proper question on appeal is whether the District Court abused its discretion in dismissing



the action based upon the grounds raised by Appellees in their Motion to Dismiss, Affidavit and Statement of Reasons and Citation of Authorities filed on about August 25, 1966.<sup>(347-356)</sup> These grounds were (1) the failure of plaintiff's president Mr. Preston Low (not of the plaintiff corporation as asserted by Appellees) to attend a noticed deposition and (2) the failure of plaintiff to obtain new local counsel in conformity with Rule I (e) of the Hawaii District Court. No other grounds were asserted by Appellees at this time nor does it appear from the record that any other grounds were asserted or considered by the District Court. Accordingly the Appellees are now belatedly attempting to assert new and additional grounds for support of the judgment which were not raised in the lower Court, to wit, Appellant's failure to prosecute the action based upon the entire record. This they cannot do for reasons hereinafter set forth. Appellant submits the lower Court abused its discretion in dismissing this action based upon the limited grounds set forth in their Motion to Dismiss

Appellant has filed concurrently with this Answering Brief a Motion of Appellant to Strike/<sup>Portions of</sup> Appellees' Answering Brief on the ground it has not complied with Rule 18 of this Court and specifically subsections 2(c), 2(e) 3 and 8 which require that all briefs, both of Appellant and Appellee, exhibit a clear statement of the points of law and facts to be discussed with a reference to the pages of the record and the authorities relied upon in support of each point and, if the Appellant's statement of the





case is controverted, then with record references supporting each statement of fact or mention of trial proceedings.

# I

Grounds Not Asserted in the Trial Court Cannot be Asserted for the First Time in the Appellate Court in Support of a Judgment.

Appellees in support of the Judgment of Dismissal urge this Court on appeal to consider the entire record below, when this point was not urged or considered in the lower Court as far as the record discloses. The only grounds for dismissal raised in the Court below were the two mentioned above, viz (1) Appellant wilfully failed to appear for a deposition and (2) Appellant failed to prosecute its action diligently because of its failure to name new local counsel in conformance with local Rule I(e). Everything else is irrelevant on this appeal.

"Appellate Courts are especially careful to prevent injustice resulting from affirmations of a judgment upon a ground not presented to the trial Court and which might have been overturned by additional evidence had attention been directed to it"

Uuku v. Kaio 20 Hawaii 567, 572.

See also:

Duarte v. Bank of Hawaii, CA 9 1961, 287 F2d 51

Baker v. Kaiser, 126 Fed 317, 319, 320





Southern Cotton Oil Co. v. Shelton, CA 4, 220 Fed. 247, 256

A point not raised in the trial Court cannot be raised for the first time on appeal.

Missouri K & T Ry Co. v. Wilhoit, 160 Fed 440 (CA 8 1908)

And these additional authorities:

Peck v. Henrich, 167 US 624

Sacramento Suburban Fruit Lands Co. v. Melin  
CA 9 1929, 36 F2d 907

Austad v. U.S.A., CA 9, 20, 876, decided November 16, 1967

In Peck, one ground advanced in support of the judgment was that plaintiff had not complied with the laws of Maryland. The Supreme Court in its opinion (Justice Gray) stated at p.628:

"But the ground is not open to the defendant on the record. No such objection ..... was made at the trial".

In Sacramento, there had been a judgment for plaintiff and on appeal it for the first time asserted the Statute of Limitations. In refusing this assertion, the Court stated:

".... and now to affirm a judgment for a reason apparently never thought of by the lower Court or either party to the controversy would hardly be consistent with the spirit of modern judicial administration. Very generally is applied the rule that a theory accepted and acted upon by all in the trial Court cannot be repudiated in the Appellate Court."



And most recently in Austad decided by this Court in November, 1967 it was held in an action to foreclose a mortgage by the Small Business Administration that a letter not cited to the trial Court as part of their (defendants') affirmative defense for impairment of collateral could not be considered by the Appellate Court on appeal.

Appellant concludes from the foregoing that Appellees' attempt to base their Motion to Dismiss and the Judgment of Dismissal upon the entire record cannot be considered on appeal when it is now asserted for the first time, and that their Motion to Dismiss and the Judgment of Dismissal must be considered upon the limited grounds advanced in the lower Court viz (1) the failure of plaintiff's president Mr. Low to attend a noticed deposition, and (2) the failure of plaintiff to obtain new local counsel in conformity with local Rule I(e).

## II

The Dismissal on the Ground of a Failure to Attend a Noticed Deposition Under the Circumstances Constituted Judicial Error.

Plaintiff's president Mr. Low was noticed for a deposition on June 28, 1966 at the offices of defendants' counsel in Honolulu<sup>1/</sup>. Mr. Low was in Honolulu on June 20, 1966 and asked plaintiff's local counsel of record to obtain a continuance as he was on his way to Hongkong on a business trip and could not attend a deposition in Honolulu on this date. Plaintiff's local counsel then

<sup>1/</sup> This was the first and only Notice of taking of deposition served on Mr. Low.





wrote counsel for defendants setting forth the circumstances and asking for a continuance of the deposition and also asking for a reply to his letter. Defendants did not reply to the letter. Plaintiff assumed that a continuance would be granted; at the least it was assumed defendants did not object to not holding the deposition on the date set in the written notice. It is to be noted that in the affidavit of E. Gunner Schull in support of the Motion to Dismiss (351-353) it is not alleged that defendants were present themselves at the noticed place for the deposition; only that plaintiff (i.e. plaintiff's president Mr. Low) was not present at the time and place specified. For all that appears from the record defendants likewise were not present at the time and place specified and apparently had abandoned the idea of taking Mr. Low's deposition.

Accordingly Appellant submits that under the circumstances plaintiff's president Mr. Low did not wilfully fail to appear for his deposition as provided by Rule 37(d) of the Federal Rules of Civil Procedure.

The case of Fischer v. Dover Steamship Co. CA 2 1954, 218 F2d 682 cited by Appellees in their brief at page 15 is clearly distinguishable on the facts. There, plaintiff failed to present himself for deposition after four and one-half months (as contrasted to only two months here), the defendant moved to dismiss, the Court ordered a dismissal unless plaintiff appeared for his deposition within 60 days and plaintiff then failed to appear





within the additional 60 days. In upholding the dismissal the Appellate Court noted that the plaintiff offered no plausible and specific explanation for his failure to attend the deposition, whereas it is submitted plaintiff here has offered such an explanation, viz, local counsel wrote a letter requesting a continuance and a reply thereto and defendants made no reply.

### III

#### The Dismissal on the Ground of a Failure to Prosecute Under the Circumstances Constituted Judicial Error.

The only basis for dismissing the action on the ground of a failure to prosecute must in the last analysis be based on Appellant's failure to secure the assistance of new local counsel, which in turn was made necessary by the trial Court's approval of an ex parte order permitting plaintiff's local counsel of record to withdraw without any notice to plaintiff and without any evidence on the record justifying such withdrawal.

Appellees argue (Answering Brief, p. 17) that Mr. Naito had withdrawn from private practice to become a full time employee of the State of Hawaii, and therefore there was a good reason for the Court in permitting him to withdraw as local counsel of record. The reason however should have been set forth in an affidavit attached to the Motion and not by an unsworn memorandum.

Switzer Brothers, Inc. v. Byrne CA 6th, 1957, 242 F2d 909  
Rule 6(d), Federal Rules of Civil Procedure  
2 Moore's Fed. Practice, Section 6.11, 1495





Even assuming the reason for Mr. Naito's withdrawal had been properly presented there is no reason offered or even suggested in the record why the Court permitted Mr. Shim and Mr. Oki to withdraw. They were Mr. Naito's partners and also plaintiff's local counsel of record (260-261, 342-346). Furthermore Appellees in their Answering Brief have not commented upon or attempted to distinguish the authorities cited at pages 14 to 16 of Appellant's Opening Brief, and specifically the Laskowitz case (Laskowitz v. Shellenberger [S.D. Calif. 1952] 107 F Supp 397) where it was held that an attempted unilateral withdrawal of an attorney for a corporate party was not proper; such withdrawal could only be effected by a substitution of attorneys approved by the Court. This was not done in the instant case and in itself constituted prejudicial error since it left the plaintiff, an insolvent corporation, without local counsel and without the ability to secure new local counsel except on a contingency basis due to its lack of resources and the complexities and expense involved in anti-trust litigation.

If this ex parte order was improperly granted by the trial Court then Appellant's subsequent conduct in not attending the deposition and the hearings on Appellees' Motion to Dismiss may be excused, at least until it was able to obtain new local counsel or its former local counsel was re-instated.

Finally Appellees argue that Appellant's objection to the withdrawal of its local counsel comes too late (Answering Brief pp. 16-18). In answer to this, Appellant argues that it made





every effort to secure new local counsel in compliance with local Rule I(e), during the period June 22, 1966, the date of withdrawal of Messrs. Maito, Shim and Oki, to at least September 23, 1966 (affidavits of Arthur H. Tibbits 368-370, 375-387 and 405-417) and only filed its Motion to Vacate Withdrawal of Counsel on September 23, 1966 (affidavit of Arthur H. Tibbits 405-417) when it was unable to obtain new local counsel due to lack of funds. Under these circumstances Appellant submits its Motion to Vacate Withdrawal of Counsel filed approximately three months after the said withdrawal did not come too late.

#### Conclusion

In conclusion Appellant submits that the prejudicial error in this action was occasioned by the District Court in permitting its local counsel to withdraw without proper notice and without good cause shown by affidavit as required by the Federal Rules of Civil Procedure, and that the Dismissal of this action on the limited grounds of a failure to attend a noticed deposition and a failure to obtain new local counsel and to prosecute constituted judicial error.


Appellant sincerely urges this Honorable Court to rectify this error of the District Court by reversing the Judgment of Dismissal, ordering the re-instatement of Appellant's local counsel of record Messrs Naito, Shim and Oki (or alternatively Messrs Shim and Oki) and ordering the action to proceed to trial.





Dated at San Francisco, California, this 5th day of  
February, 1968.

Respectfully submitted,

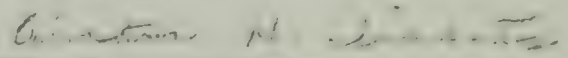
---

Arthur H. Tibbits  
Attorney for Appellant



CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief of appellant is in full compliant with those Rules.

  
Arthur H. Tibbits

AFFIDAVIT OF MAILING

State of California }  
City and County of San Francisco } ss.

Arthur H. Tibbits, being first duly sworn, deposes and says:

I am an active member of the State Bar of California and my business address is 55 New Montgomery Street, San Francisco, California; I served a copy of the attached Appellant's Reply Brief by placing a copy in an envelope addressed to the following persons at their office addresses as below:

Gilbert E. Cox, Esq.  
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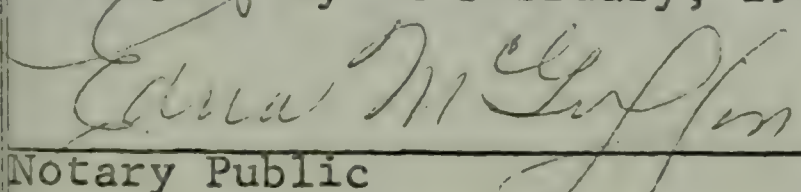
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The envelopes were then sealed and postage fully prepaid and on February 5, 1968 were deposited in the United States mail at San Francisco, California.

  
Arthur H. Tibbits

Subscribed and sworn to before me  
this 5th day of February, 1968.

  
Notary Public

EDNA MCGUFFIN

My Commission Expires Jan. 9, 1969





No. 21737

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

HONOLULU LUMBER CO., LTD.,	)
	)
Appellant,	)
	)
vs.	)
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CO., LTD., HAWAII BUILDERS SUPPLY	)
CO., LTD., ISLAND LUMBER CO., LTD.,	)
LEWERS & COOKE, LTD., MID PAC LUMBER	)
CO., LTD., et al.,	)
	)
Appellees.	)

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APPELLEES' ANSWERING BRIEF

**FILED**

JAN 15 1968

WM. B. LUCK, CLERK

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No. 21737

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HONOLULU LUMBER CO., LTD.,

Appellant,

vs.

AMERICAN FACTORS, LTD., CITY MILL  
CO., LTD., HAWAII BUILDERS SUPPLY  
CO., LTD., ISLAND LUMBER CO., LTD.,  
LEWERS & COOKE, LTD., MID PAC LUMBER  
CO., LTD., et al.,

Appellees.

APPELLEES' ANSWERING BRIEF

Statement of Jurisdiction

This is an appeal from a final judgment in favor of the appellees rendered by the United States District Court for the District of Hawaii in an action brought by the appellant pursuant to 15 U.S.C. §§15 and 26. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1291 and 1294. Notice of appeal was filed on October 12, 1966, thirty days after entry of judgment on September 12, 1966 and after Order Denying Motion to Vacate Withdrawal of Counsel and Order Denying Motion to Vacate and Motion for Rehearing entered on September 27, 1966.





## Statement of the Case

The complaint in this action was filed November 30, 1961 alleging violations of sections 1 and 2 of the Sherman Act and sections 2, 3, 7 and 8 of the Clayton Act against nine defendants. (Record pp. 1-14). After a delay of more than three years, the appellant filed an amended complaint on November 13, 1964 alleging only violations of sections 1 and 2 of the Sherman Act against six defendants. (Record pp. 269-283). During the three years there was a period of more than sixteen months (September 28, 1962 - February 10, 1964) without a single entry on the docket and the complaint was dismissed with prejudice on October 15, 1964 for failure of the appellant to file its amended complaint in a timely manner, with the order of dismissal allowing the appellant thirty days within which to set aside the dismissal by filing its amended complaint. (Record pp. 257-259).

Upon the filing of the amended complaint, the appellees moved to dismiss the complaint under Rule 41(b) of the Federal Rules of Civil Procedure for failure of the appellant to comply with the order of the District Court requiring the appellant to put its claim in a more definite statement. (Record pp. 290-300). As a result of the motion to dismiss, the allegations in the complaint relating to section 2 of the Sherman Act were dismissed with leave to amend. (Record pp. 311-313). The appellant did not amend the complaint and the





appellees' answers were filed on March 4, 1965. (Record pp. 314-341). At this time the appellant had conducted what it describes as "extensive pretrial discovery" (Opening Brief p. 3), consisting of a single set of written interrogatories. The appellant took no further action in the case until September 6, 1966 after a motion to dismiss had been filed by the appellees, which was more than eighteen months from the date the appellees filed their answers.

On July 9, 1965, the action was called in a general call of the docket and continued at the appellant's request. On March 10, 1966, the appellant's local counsel advised Mr. Arthur Tibbits, appellant's principal counsel who was to handle the trial of the case, of his withdrawal from the action. (Record p. 346). On June 10, 1966 the action was called again, and the action was set for pretrial on September 6, 1966 at the direction of the District Court, not by the request of the appellant as indicated in the Appellant's Opening Brief (Opening Brief pp. 3 and 10).

On June 17, 1966 the appellees served a notice to take the deposition of the appellant by its president, Preston Low, and to produce for examination certain business records. The deposition was set for June 28, 1966. On June 24, 1966 appellant's local counsel obtained the approval of the District Court for withdrawal as counsel. (Record pp. 342-343). The appellant failed to appear at the deposition without obtaining any



extension or continuance from the District Court or from the appellees. It appears that Preston Low was present in Honolulu between June 17, 1966 and June 28, 1966. (Record p. 366).

No extension or continuance of the date of pre-trial conference was granted. On August 25, 1966, twelve days prior to the date of the pretrial conference, the appellees, being unable to conduct discovery, moved to dismiss the complaint for failure of the appellant to appear at its deposition and for lack of prosecution. (Record pp. 347-356). The hearing on the motion to dismiss was set for 2:30 p.m. on September 2, 1966. (Record p. 356). On the morning of September 2, 1966, the District Court received a telegram from the appellant's counsel stating that he would not attend the conference. (Record p. 454). After the hearing, the District Court granted the motion to dismiss. Thereafter the appellant filed motions and affidavits with numerous explanations but neither appellant nor counsel for appellant appeared at hearings held on September 2, 1966, September 20, 1966 or September 26, 1966, or at the pretrial conference scheduled for September 6, 1966.

#### Questions Involved

Whether the District Court, upon the record and circumstances in this action, abused its discretion in ordering that the action be dismissed for want of prosecution and for failure of appellant to appear for deposition.

Whether the District Court abused its discretion in





denying the appellant's motion to vacate withdrawal of counsel and motion to vacate dismissal.

### Summary of Argument

The District Court did not abuse its discretion in dismissing this action for failure of the appellant to attend deposition and lack of prosecution where the case had been pending for almost five years; the complaint had been dismissed once for failure of the appellant to plead in a timely manner; the appellant had taken no action in the case for a period of 16 months and another period of 18 months immediately prior to dismissal during which time the case was at issue; the appellant failed to appear for its deposition; the appellant failed to maintain local counsel as required by the local rules of the District Court; the appellant's principal counsel, who was to handle the trial, notified the District Court that he would not attend a scheduled pretrial conference; and the appellant's counsel failed to appear at the pretrial conference and at three other hearings involving the action.

The District Court did not abuse its discretion in denying the appellant's motions to vacate withdrawal of counsel and order of dismissal where the appellant had failed to object to withdrawal of counsel until after the dismissal of the case and three months after the withdrawal; and where the appellant offered no excuse as to the various defaults and delays in the case except the unwillingness of the appellant to pay for the





expenditures of litigation.

ARGUMENT

1. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING THE DISMISSAL OF THIS ACTION FOR LACK OF PROSECUTION AND FOR FAILURE TO APPEAR FOR DEPOSITION.

In Appellant's Opening Brief the grounds for dismissal (lack of prosecution and failure to appear for deposition) are treated as different issues but it is submitted that the grounds are not separable since the failure of the appellant to attend its deposition is one of the facts evidencing lack of prosecution and such failure constitutes ample ground in itself for dismissal for want of prosecution.\* The proper question on appeal is whether the District Court abused its discretion in dismissing the action based upon the entire record and circumstances of the action, including the failure of appellant to attend its deposition.\*\*

In Link v. Wabash R. Co., 370 U.S. 626, 82 Sup.Ct. 1386 (1962), the United States Supreme Court affirmed the dismissal of an action by a District Court for want of prosecution

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\*See Fisher v. Dover Steamship Co., 218 F.2d 682 (2d Cir. 1954).

\*\*Whether the appellant's failure to appear for deposition constituted sufficient ground per se for the District Court to dismiss the action is not before the Court, but for the Court's reference the appellees have included a separate section in reply to the appellant's contention that the failure was excusable.



on the part of the appellant where appellant's counsel failed to attend a pretrial conference without obtaining the consent of opposing counsel or the District Court for a continuance. In reviewing the District Court's order of dismissal and the affirmance by the Court of Appeals, the Supreme Court emphasized the relevance of the entire history of the case in the determination of the existence of lack of prosecution on the part of the appellant. The Court stated (370 U.S. at 633-635):

"On this record we are unable to say that the District Court's dismissal of this action for failure to prosecute, as evidenced only partly by the failure of petitioner's counsel to appear at a duly scheduled pre-trial conference, amounted to an abuse of discretion. It was certainly within the bounds of permissible discretion for the court to conclude that the telephone excuse offered by petitioner's counsel was inadequate to explain his failure to attend. And it could reasonably be inferred from his absence, as well as from the drawn-out history of the litigation that petitioner had been deliberately proceeding in a dilatory fashion. . . .

. . .

"We need not decide whether unexplained absence from a pretrial conference would alone justify a dismissal with prejudice if the record showed no other evidence of dilatoriness on the part of the plaintiff. For the District Court in this case relied on all the circumstances that were brought to its attention, including the earlier delays. . . ."

(Emphasis in original.)

As in Link, counsel for the appellant in the instant case requested a continuance of a scheduled pretrial conference





immediately before the date of the conference. However, in Link the District Court did not advise appellant's counsel that the request would be denied. In the instant case appellant's counsel was so informed (Record p. 465) and the appellant's counsel simply advised the District Court by telegram that he would not attend the pretrial conference. The telegram was received by the District Court on September 2, 1966 (Record p. 454) prior to the scheduled hearing on the appellees' motion to dismiss under Rules 37(d) and 41(b) of the Federal Rules of Civil Procedure.\* After the hearing on September 2, 1966, the District Court granted the appellees' motion to dismiss. The appellant's counsel failed to appear either at the hearing on the motion to dismiss on September 2, 1966 or at subsequent hearings held on September 20, 1966 and September 26, 1966. The excuses offered by the appellant are "inability to secure new

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\*Rule 37(d) provides in part:

" . . . If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, . . . the court on motion and notice may . . . dismiss the action. . . ."

Rule 41(b) provides in part:

" . . . For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . ."





local counsel as required by Rule 1(e)\* of the District Court local rules and because of the lack of finances to pay for travel expenses of its counsel from his office in San Francisco to Honolulu and return." (Opening Brief, p. 6).

Although the history of the litigation in Link is somewhat similar to the instant case, the dilatoriness of the appellant in the instant case is considerably more evident than in Link. The Link case had been pending six years as opposed to five years in the instant case. However, two years of the delay in Link were the result of an appeal of a judgment on the pleadings. There was one 19-month period of inactivity in Link as opposed to two periods of 16 months and 18 months, respectively, in the instant case. In addition to the delays and periods of inactivity, the complaint in the instant case was dismissed once for failure to file pleadings in a timely manner; the appellant failed to appear for its deposition, counsel for appellant refused to appear at a scheduled pretrial conference and failed to appear at three hearings in the action held during

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\*Rule 1(e) of the Rules of Court for the United States District Court for the District of Hawaii provides:

"(e) Permission to Participate in a Particular Case.

Any member in good standing of the bar of any court of the United States or of the highest court of any state, but not an active member of the bar of this court, may, upon oral or written motion, be granted permission to participate in the conduct of a particular case in this court, but such motion shall be allowed only if such attorney associates with him an active member of the bar of this court, who shall at all times meaningfully participate in the preparation and trial of the case."



September 1966. Nothing in the record in Link approaches the dilatoriness shown in the record herein.

It should be noted that the spirited dissent in Link by Justice Black on the grounds that the client should not be penalized for the default on the part of his lawyer has no application in this case. The dismissal resulted in large part from the failure of appellant's president to attend the deposition and from his refusal to pay for the hiring of local counsel or for the travel expenses of his San Francisco counsel. Mr. Low apparently has funds as evidenced by his travels to Hong Kong on personal business. (Record p. 366). Mr. Low states that in the past he has advanced funds to the appellant for this action but that "he is no longer willing to do so, except to a limited extent." (Record p. 365). No authority has been found allowing a plea of poverty on the part of a corporation to justify delay in litigation or failure to make court appearances, particularly where the corporation has access to funds. Even in a case where an indigent individual is plaintiff, the case will be dismissed for want of prosecution if the individual is unable to obtain counsel and he refuses to represent himself. See Reid v. Charney, 235 F.2d 47 (6th Cir. 1956).

The appellant offers various excuses for the defaults of the appellant and his counsel between June 1966 and September 1966, but the summary of the excuses is that the appellant refused to spend any money to prosecute the appeal





and allegedly assumed that the appellees and the District Court would not object to continuing the case in hopes that the appellant might find a way to prosecute the case without any expenditure on its part. Furthermore, there is no explanation whatsoever of the reason for the delay from March 1965, when the case was finally at issue, until June 1966, and the appellant's pretrial statement shows that the appellant has been deliberately proceeding in dilatory fashion. Mr. Tibbits represented to the District Court in plaintiff's Pretrial Statement (Record pp. 361-364), that the appellant has been ready for trial since June 10, 1966. (Record p. 364). If this is true, the appellant must have been ready for trial since March 1965 when the appellees' answers were filed. The appellant had local counsel at that time and its discovery was apparently completed. However, the appellant made no request to place the action on the trial calendar. In fact, the appellant did nothing for a year and a half--until after the action had been dismissed.

Rather than showing any valid excuse, the appellant has shown only unexplained delay. This action has been pending almost five years and the appellant claims to have been prepared to go to trial for over a year, March 1965-June 1966 (and it purports to have had local counsel during this period). During this time the appellant not only failed to make any effort to bring the case to trial but also neglected to attend a duly noticed deposition, making no attempt to make any substitute





arrangements for such deposition. Following the unexplained delay in bringing the case to trial the appellant lost its local counsel and now presents this fact as its excuse for further delay.

In Hicks v. Bekins Moving & Storage Co., 115 F.2d 406 (9th Cir. 1940), the District Court dismissed an action which had been at issue for a period of twenty months without any action being taken by the plaintiff. The Court on its own motion notified counsel that the case would be called for dismissal for want of prosecution under the local rule of the District Court providing that the case may be dismissed if pending for more than one year without any proceedings of record having been taken. Six days after the dismissal, counsel for appellant filed a notice of substitution of attorneys, advising that he had been substituted as counsel for appellant. He also filed numerous affidavits explaining the failure of previous counsel to act and the failure of substitute counsel to enter the case in a timely manner. On motion for reinstatement and motion to vacate the order of dismissal, based upon the affidavits, the motions were denied. The appellant appealed from the order of dismissal and the refusal of the Court to reinstate the case. The Court of Appeals in affirming the District Court stated (115 F.2d at 408):





"Fundamentally, but two questions are presented: (1) Did the lower court have the power to enter such an order of dismissal; and (2) if so, was there an abuse of discretion.

. . .

"This power to dismiss for want of prosecution may be exercised by the court of its own motion, though no action to secure such result be taken by the defendant. . . Moreover, an order of dismissal may be granted, notwithstanding the plaintiff has been stirred into action by the impending dismissal, for subsequent diligence is no excuse for past negligence. . . .

"The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination, and unless it is made to appear that there has been a gross abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution its decision will not be disturbed on appeal." Inderbitzen v. Lane Hospital, supra [17 Cal.App.2d 103, 61 P.2d 516]. . . . We do not find here any abuse of discretion on the part of the court below in dismissing the cause, for the record shows that the cause had been called sixteen times before being set for dismissal and the present counsel had been corresponding with the original counsel, relative to assuming the duties of attorney for plaintiff, for a period of almost eight months, during which time the former was having the case 'watched,' apparently without disclosure to the court which was calling the case and receiving no response. It was not necessary for the defendants to show specific impairment of their defense, because the law will presume injury from unreasonable delay. . . ." (Emphasis added.)

It is submitted that the appellant has made no showing that it has used diligence at any stage of the proceeding to expedite this case to a final determination. It was well within the discretion of the District Court to find such lack of diligence on the part of both appellant and its counsel where





there have been years of unexplained delay together with numerous defaults allegedly resulting from the refusal of the appellant to furnish litigation expenses.

2. THERE WAS NO ABUSE OF DISCRETION ON THE PART OF THE DISTRICT COURT IN DETERMINING THAT THE APPELLANT'S FAILURE TO APPEAR FOR DEPOSITION CONSTITUTED A PROPER GROUND FOR DISMISSAL.

As appears from the record herein, the plaintiff's deposition by examination of the appellant's president, Preston Low, was noticed by the appellees for June 28, 1966 (Record pp. 351-352). The affidavit of Preston Low filed September 6, 1966 (Record pp. 365-367), states that he was in Honolulu on June 20, 1966 and that Mr. Low was on his way to Hong Kong and requested Mr. Shim to obtain a continuance of the deposition. Mr. Low apparently did not wait around to see whether Mr. Shim could obtain such a continuance. The mere fact that he requested Mr. Shim to obtain a continuance constitutes his sole excuse for not attending his duly noticed deposition. Mr. Low now states, after the action has been dismissed, that he is willing and at all times has been willing to have his deposition taken by the appellees at any time. However, the fact is that he has been in Honolulu since being noticed for his deposition and he has never made any effort to arrange for the taking of the deposition. Mr. Low could easily have called the appellees' counsel by telephone while he was in town. But he did not. He could have instructed Mr. Tibbits to follow up. But he did not. Nor did Mr. Tibbits take it upon himself to confirm either





the District Court's or the appellees' assent to a continuance of the deposition or to the continuance of the pretrial conference.

The appellant contends throughout Section I of the Opening Brief that Mr. Low was willing to have his deposition taken at any time upon two weeks' notice. However, Mr. Low never expressed such willingness to the appellees or to the District Court until after the case had been dismissed. Mr. Low's affidavit shows a deliberate choice on his part not to appear and to let matters drift and take their own course. In Fisher v. Dover Steamship Co., 218 F.2d 682 (2d Cir. 1954), the plaintiff was served with a notice to take deposition of the plaintiff. The plaintiff failed to appear for a deposition and the case was dismissed under Rule 41(b). A motion brought on plaintiff's behalf under Rule 60(b) was denied by the District Court, and this denial was affirmed by the Court of Appeals. The Court of Appeals specifically noted that the plaintiff did not present himself for a deposition at any time after the date noticed and that the plaintiff's personal inaction and neglect justified the dismissal. Mr. Low knew that the appellees wished to take his deposition and a cursory check would have revealed that no continuance had been granted. Mr. Low's failure to respond to the notice or to make any effort after his default to arrange for the taking of his deposition shows only his lack of concern about the proceeding of this action.



3. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S  
MOTION TO VACATE WITHDRAWAL OF COUNSEL AND  
REINSTATE COUNSEL OF RECORD.

Throughout the Opening Brief the appellant maintains that the withdrawal of Shim & Naito as counsel on June 22, 1966 (Record pp. 342-343) was not accomplished in a proper manner and that the improper withdrawal excuses the appellant's defaults in this action. It appears that appellant was advised that its local counsel was withdrawing as early as March 10, 1966 (Record p. 346). Appellant was advised in June 1966, by the Clerk of the District Court, that its local counsel had withdrawn (Record p. 464-a). Appellant made no objection to the withdrawal for three months after the notification by the Clerk and until after the action had been dismissed. It is submitted that appellant's objection came too late and that the District Court did not abuse its discretion in denying the motion to vacate withdrawal.

Appellant contends that an attorney may never withdraw without the consent of his client. This contention is refuted by the very authority cited by the appellant.\* An attorney may always withdraw upon a showing of good cause, which includes, for example, the failure of the client to make payments of fees during

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\*Appellant refers the Court to 7 C.J.S. Attorney and Client, §§120 and 121 (1937). Appellees refer the Court to 7 C.J.S. Attorney and Client, §110 (1937).





litigation. See, e.g., Harms v. Simkin, 322 S.W.2d 930 (Mo.App. 1959), or when the attorney discovers his client has no cause, see McNealy v. State, 183 So.2d 738 (Fla.App. 1966). The memorandum in support of withdrawal of counsel executed by Messrs. Naito, Shim and Oki indicates that Mr. Naito had withdrawn from private practice to become a full-time employee of the State of Hawaii. Is it appellant's contention that Mr. Naito should resign his position with the State in order to represent appellant for nothing? Suppose Mr. Naito had been offered an appointment to the judiciary. Is it appellant's contention that Mr. Naito would be unable to accept the position offered until the instant case was finally resolved or until the appellant could secure local counsel willing to work without compensation? It is worthy of note that the appellant complains that the "usual and proper procedure" was not followed with respect to the withdrawal of counsel (Opening Brief, p. 15). However, in spite of the rule that an enlargement of time may only be allowed by the court,\* the appellant argues that it was entitled to assume that a continuance of deposition and pretrial conference had been granted merely because the appellees did not respond to a letter. (Opening Brief, p. 8).

Although the local rules require the retaining of local counsel, the action was not dismissed on this ground. Appellant

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\*Rule 6(b) Federal Rules of Civil Procedure.





apparently believes that it is entitled to delay the action indefinitely until local counsel can be obtained who will work on a contingency basis. However, the refusal or inability of the appellant to pay the transportation expenses of its primary counsel or to compensate local counsel has never been recognized as an excuse justifying a delay in prosecution.

Aside from the failure of the appellant to object to the withdrawal of counsel in a timely manner, the question of whether a further continuance is justified because of withdrawal of counsel is a matter for the court to decide in its discretion. In Grunewald v. Missouri Pacific R. Co., 331 F.2d 983 (8th Cir., 1964), the attorney for the plaintiff withdrew several days before the trial and a new attorney wired the clerk of the District Court requesting a continuance. No one appeared for the plaintiff at trial and the District Court dismissed the action for failure to prosecute. In reviewing the history of the case, the Court of Appeals noted that the case had been at issue for seventeen months before dismissal and that various continuances had been granted because of prior changes in counsel. The Court summarized the law as to dismissal for lack of prosecution and withdrawal of counsel as follows (331 F.2d at 985-986):

"It is well settled, of course, that a federal court has inherent power to dismiss a civil case for want of prosecution. . . . Dismissal for this reason is then a matter of discretion. On appeal the applicable standard is that of the presence or absence of abuse. The Supreme Court said, in Link, supra, p. 633 of 370 U.S., p. 1390 of 82 S.Ct.,





'Whether such an order can stand on appeal depends not on power but on whether its was within the permissible range of the court's discretion.'

. . .

"It is equally well settled, and plaintiff's counsel in his brief concedes, that in a civil case an attorney's withdrawal does not give his client an absolute right to a continuance. This, too, is a matter for the court's discretion. 48 A.L.R.2d 1155, 1157-1158, and cases cited; Harms v. Simkin, 322 S.W.2d 930, 933 (Mo.App. 1959). Here again, a trial court's refusal to grant a continuance will not be disturbed on appeal unless abuse of discretion is demonstrated. . . ."

. . .

"The cited annotation at 48 A.L.R.2d 1155 concerns withdrawal or discharge of counsel in a civil case as ground for continuance. It observes, 48 A.L.R.2d p. 1159, that

'\*\*\*the cases in which the refusal of continuance was held justified outnumber, by ratio of three to one, the cases in which the refusal of continuance was held arbitrary--a clear indication of the fact that the exercise of discretion by the trial court will be disturbed only in extreme cases in which it clearly appears that the moving party was free of negligence.'"

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\* In defining discretion the court in Grunewald quoted with approval its definition in Bowles v. Goebel, 151 F.2d 671, 674 (8th Cir., 1945) as follows (331 F.2d at 986):

"Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the purpose for which the power exists.\*\*\* And the process of an appellate court in examining exercised discretion for abuse is not one of creating prescriptions and definitions for the curbing of judgment generally, but simply one of viewing the action taken in an immediate case in the relativeness of its entire situation to see whether it compels the conviction that there has been a responsible exercise in a legal sense of official conscience on all the considerations involved in the situation.'





The Court of Appeals noting the drawn-out history of the litigation and that there was no showing that the withdrawal of counsel immediately before trial "was without prior notice to the plaintiff or without her consent or fault" (Grunewald v. Missouri Pacific R. Co., supra, at 987) held that the dismissal was not an abuse of discretion subject to reversal.

In the instant case the appellant had notice of its local counsel's intention to withdraw six months prior to the withdrawal of the action (Record p. 346) and the appellant made no objection to the withdrawal until after the case was dismissed. Furthermore, the appellant had ample time to set the case for trial prior to receiving notice of local counsel's withdrawal. It was within the discretion of the District Court to assume that the failure of the appellant to bring the case to trial, while it had local counsel, was attributable to the appellant's negligence and lack of diligence.

4. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION TO VACATE DISMISSAL.

On September 10, 1966 the appellant moved to vacate the dismissal and moved for a rehearing on the appellees' motion to dismiss. The appellant noticed the hearing for September 20, 1966 (Record p. 386). When the appellant's





counsel failed to appear at the hearing, the District Court continued the hearing until September 26, 1966 and the Clerk of the District Court sent a letter to the appellant's counsel urging him to appear at the hearing "with or without local counsel". (Record p. 470). The appellant's counsel failed to appear at the hearing on September 26, 1966 and after hearing argument from the appellees and the testimony of Alvin Shim, Esq., the District Court denied the appellant's motion to vacate dismissal.

In effect, the District Court gave the appellant an opportunity for a rehearing on the motion to dismiss but the appellant's counsel refused to appear.

In view of the long period of unexplained delay in the action, the various defaults on the part of the appellant, and finally, the repeated refusal of the appellant's counsel to appear before the Court, it is submitted that it was not only proper for the District Court to deny the motion to vacate dismissal, but that it would have been an abuse of discretion on the part of the District Court to have permitted the appellant to further occupy the time of the appellees or the Court in this litigation.

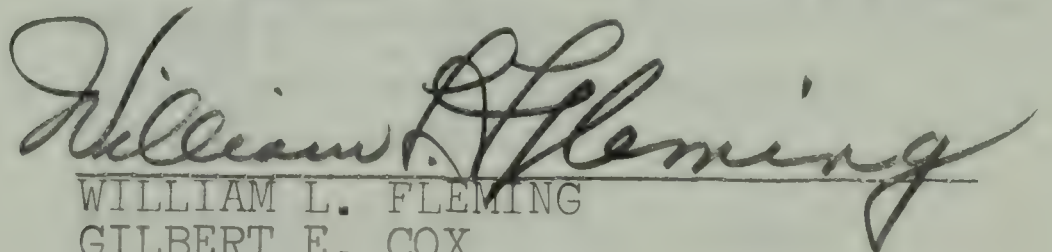


CONCLUSION

There was no abuse of discretion on the part of the District Court in finding that the appellant neglected its duty to diligently prosecute this case. The District Court, faced with a record replete with the appellant's delay and the refusal of appellant's counsel to appear before the Court, did not abuse its discretion in ordering the dismissal of this action for lack of prosecution and for failure to appear for deposition or in denying appellant's motions to vacate the dismissal and to vacate withdrawal of counsel.

DATED: Honolulu, Hawaii, January 13, 1968.

Respectfully submitted,



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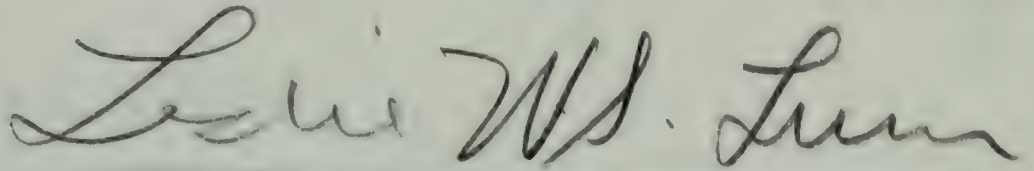


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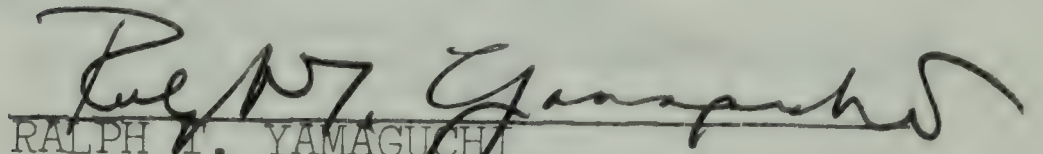
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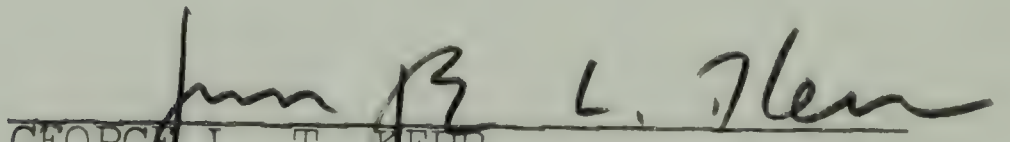


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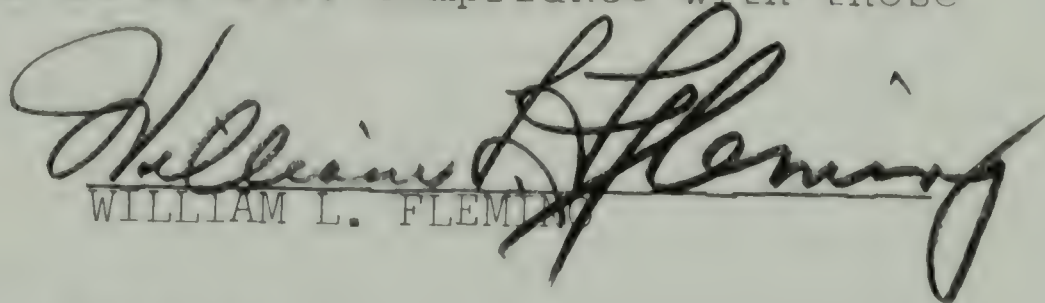
CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my



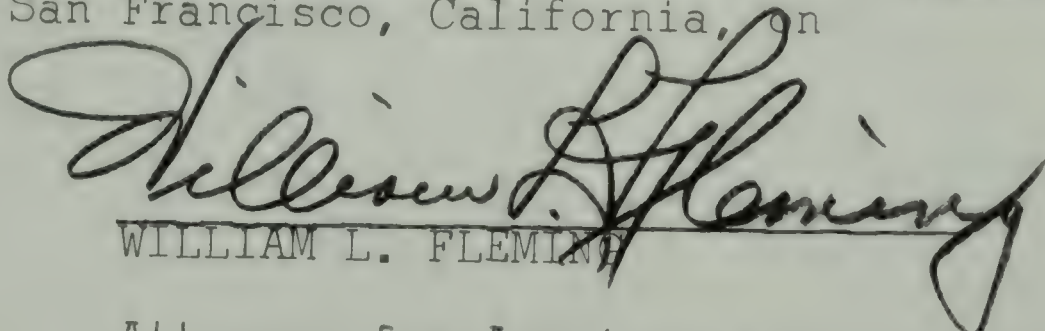


opinion, the foregoing brief is in full compliance with those Rules.

  
WILLIAM L. FLEMING

CERTIFICATE OF MAILING

It is hereby certified that service of the foregoing Answering Brief of Appellees was made upon the Appellant by mailing three copies hereof to Appellant's attorney, Arthur H. Tibbits, 55 New Montgomery Street, San Francisco, California, on January 13, 1968.

  
WILLIAM L. FLEMING

Attorney for American Factors, Ltd.



NO. 21737

In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

HONOLULU LUMBER CO., LTD.,

Appellant,

vs.

AMERICAN FACTORS, LTD., CITY MILL  
CO., LTD., HAWAII BUILDERS SUPPLY  
CO., LTD., ISLAND LUMBER CO., LTD.,  
LEWERS & COOKE, LTD., MID PAC  
LUMBER CO., LTD., et al.,

Appellees.

---

Appellant's Petition for a Rehearing  
and Request for a Hearing in Banc

Arthur H. Tibbits  
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Attorney for Appellant  
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**FILED**

MAY 17 1968

WM. B. LUCK, CLERK





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Appellees.

Appellant's Petition for a Rehearing  
and Request for a Hearing in Banc

#### INTRODUCTION AND REFERENCES

Appellant is in receipt of the proposed Order of the Court in this cause and respectfully petitions for a rehearing and for a hearing in banc upon the rehearing herein sought. References herein are to Appellant's Opening Brief (AOB), Appellees' Answering Brief (AAB), and Appellant's Reply Brief (ARB).

I

THE ORDER OF THIS COURT DOES NOT FOLLOW THE FEDERAL RULES OF CIVIL PROCEDURE, RULES 6 and 7.

In affirming the judgment of the court below, this Court of



necessity approved the withdrawal of plaintiff's local counsel of record on June 24, 1966 upon an ex parte application unsupported by affidavit in violation of Rules 6 and 7 of the Federal Rules of Civil Procedure. As set forth in Appellant's Opening Brief (AOB 15-16) the proper procedure is to file a substitution of attorneys consented to by both the old and new attorneys and by the client; but if the consent of the client is not obtainable, by a court order upon a written application or motion therefor with notice to the client and for good cause shown supported by affidavit citing Laskowitz vs. Shellenberger (S.D. Calif. 1952), 107 F.Supp 397.

If the withdrawal of appellant's local attorneys of record was the primary cause of this appellant's failure to have its president attend a noticed deposition on June 28, 1966 or thereafter and to appear by counsel at the hearing on Appellees' Motion to Dismiss on September 2, 1966 and subsequent hearings (ARE 7-9) then such failure would be excused since under Rule 1e of the District Court's local Rules appellant was prohibited from prosecuting its action without securing new local counsel. Any appearance by its mainland counsel alone without such local counsel would have been prohibited by this rule, and consequently, an appearance by mainland counsel at the various hearings commencing September 2, 1966 would have been an exercise in futility on such counsel's part.

By affirming the judgment below this Court is in effect





holding that an attorney of record in a civil action in the federal courts may be relieved of his responsibility to his client by the simple expedient of obtaining an ex parte Order of Withdrawal unsupported by affidavit and without notice to his client or to other parties to the action. Appellant respectfully suggests that this is a consequence unintended by this Court.

## II

THE ORDER OF THIS COURT DOES NOT FOLLOW ITS RULE 17(6)

Rule 17, subsection 6 of this Court requires that it consider nothing on appeal but those parts of the record as designated by the parties. Appellant designated certain portions; Appellees did not. Appellees then referred to portions of the undesignated record in their Reply Brief (AAB 2), and Appellant moved to strike, which motion was denied.

In denying said appellant's Motion to Strike, this Court in effect considered undesignated portions of the record in deciding this appeal, in violation of its own Rule 17(6). Appellant respectfully suggests that this is a further consequence unintended by this Court.

## III

THE DISTRICT COURT'S DISMISSAL OF THIS ACTION WAS AN ABUSE OF DISCRETION

Appellant has attempted to show in its Opening Brief and Reply Brief that its apparent failure to prosecute this antitrust action in the last two months of almost five years of litigation when it





was prepared to go to trial and had in fact filed a Pre-Trial Memorandum, was due to the improper action of the District Court in permitting the withdrawal of its local counsel without just cause and without complying with the Federal Rules of Civil Procedure, Rules 6 and 7.

In addition to the cases cited therein, Appellant respectfully refers this Court to the case of

Meeker v. Rizley, CA 10 1963, 324 F.2d 269

where a dismissal for failure to appear at a pretrial hearing was reversed, the Court stating:

"The law favors the disposition of litigation on its merits. . . Dismissal is a harsh sanction and should be resorted to only in extreme cases."

#### CONCLUSION

Because of the seriousness of the foregoing consequences on the orderly administration of justice, Appellant respectfully requests this honorable Court that a rehearing be granted and for a hearing in banc upon the rehearing herein sought. If this request be denied, Appellant further requests that the Court file an Opinion setting forth its grounds for disregarding said Rules 6 and 7 of F.R.C.P. and Rule 17(6) of its own Rules.

Dated: San Francisco, California, May 17, 1968.

Respectfully submitted,



---

Arthur H. Tibbits  
Attorney for Appellant and  
Petitioner



## CERTIFICATE OF COUNSEL

I hereby certify that I have read the foregoing Petition for Rehearing and Request for a Hearing in Banc and that said Petition and Request in my judgment are well founded and not interposed for the purpose of delay.

*Arthur H. Tibbits*  
*Arthur H. Tibbits*  
\_\_\_\_\_  
Attorney for Appellant  
and Petitioner

## CERTIFICATE OF MAILING

ARTHUR H. TIBBITS, Esquire, certifies that he is an active member of the State Bar of California and that his business address is 55 New Montgomery Street, San Francisco, California 94105; that he has served a copy of the attached Appellant's Petition for a Rehearing and Request for a Hearing in Banc, of appellant HONOLULU LUMBER CO., LTD., by placing a copy in an envelope addressed to the following persons at their office addresses as below:

Gilbert E. Cox, Esq.  
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Honolulu, Hawaii

Hiroshi Sakai, Esq.  
909 City Bank Building  
810 Richards Street  
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George L. T. Kerr, Esq.  
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Honolulu, Hawaii

Leslie W. S. Lum, Esq.  
Room 257, Alexander Young Bldg.  
Honolulu, Hawaii

The envelopes were then sealed and postage fully prepaid and on May 17, 1968 were deposited in the United States Mail at San Francisco, California.

Executed on May 17, 1968 at San Francisco, California.

*Arthur H. Tibbits*  
*Arthur H. Tibbits*  
\_\_\_\_\_  
Arthur H. Tibbits





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

WILLIAM EDWARD UNSWORTH,

Appellee,

vs.

CLARENCE T. GLADDEN, Warden,  
Oregon State Penitentiary,

Appellant.

-----  
APPELLANT'S BRIEF  
-----

Appeal from the United States District Court

For the District of Oregon

HONORABLE GUS J. SOLOMON  
-----

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JUN 1 1967

FILED

JUN 7 1967

WM. B. LUCK, CLERK





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# APPELLANT'S BRIEF

## STATEMENT OF JURISDICTION OF UNITED STATES DISTRICT COURT

This is an appeal from an order by the Honorable Gus J. Solomon, Presiding Judge of the United States District Court for the District of Oregon, dated December 13, 1966, ordering that a writ of habeas corpus issue directing the appellant to release the appellee from custody.

On or about April 15, 1962, petitioner was arrested for the killing of one Tony Moore in Beatty, a village in Klamath County, Oregon. He was subsequently tried and convicted of second-degree murder, and sentenced to life imprisonment. On appeal the Supreme Court of Oregon reversed the conviction and remanded for a new trial, *State v. Unsworth*, 235 Or 234, 384 P2d 207 (1963), on the grounds that error had been committed with respect to the admission of hearsay evidence.

The district attorney for Klamath County resubmitted the matter to the grand jury which again returned an indictment. Petitioner was again tried and convicted of second-degree murder and again appealed to the Oregon Supreme Court, *State v. Unsworth*, 240 Or 453, 402 P2d 507 (1965). The Court affirmed the conviction, holding that:

(a) Petitioner's oral statements were not elicited by the officers and therefore not excludable under *Escobedo v. Illinois*, 378 US 478, 84 S Ct 1758, 12 L Ed 2d 977 (1964).





(b) That by taking the stand and testifying to substantially the same as contained in his written statements, petitioner waived any objections to the admission into evidence of the written statements on the grounds of not being advised of his right to counsel or to remain silent.

(c) For the same reason as set forth in (b), petitioner was not prejudiced by failure of the Court to make an independent determination of voluntariness before admitting the statement into evidence.

Petitioner did not on the appeal raise either the admissibility of oral statements made while intoxicated, nor the failure of the trial court to instruct the jury that less weight should be given to such statements.

Appellee then filed a petition for a writ of habeas corpus pursuant to 28 U.S.C., §§ 2241-2254, which petition was superseded by a Pre-Trial Stipulation and Order, the pertinent issues, in paraphrase, being set forth as follows:

1. Do Escobedo and Jackson v. Denno apply retroactively to petitioner's case?

2. If so, did petitioner waive his constitutional rights under these decisions?

3. If Escobedo is retroactive, and petitioner's rights were not waived, were the Escobedo requirements observed with respect to petitioner's written and oral statements?





4. If Jackson v. Denno is retroactive, and petitioner's rights thereunder were not waived, did the Court comply with the constitutional requirements of that decision?

5. Was there sufficient evidence that the killing was intentional rather than accidental to satisfy the constitutional guarantee of due process?

In his opinion accompanying the Order from which the instant appeal is taken, the District Court held, in summary:

(a) The matter was properly before the United States District Court since Unsworth had no recourse to post conviction relief as his lawyer could have raised the issue of intoxicated statements on appeal, and because the issue was implicit in his contention on appeal that the statements were inadmissible.

(b) Since Johnson v. New Jersey, 384 US 719 (1966), Escobedo does not apply retroactively to petitioner's case, and his statement is not inadmissible for that reason.

(c) Petitioner did not waive his constitutional rights as to the written statement, however, by taking the stand and testifying substantially to the same effect.



(d) Had petitioner received a hearing out of the presence of the jury on voluntariness, it might have been unnecessary for him to take the stand. (Implicit, of course, is the denial of Jackson vs. Denno safeguards.)

(e) The oral statements by petitioner at the time of his arrest were inadmissible in that he was too intoxicated to make a voluntary statement.

(f) Petitioner was deprived of his federally protected constitutional rights when the court failed to warn the jury to give less weight to oral and written statements made while under the influence of alcohol than to statements made while he was sober.

(g) The oral statements made at the time of arrest provided the basis for the jury finding that the killing was intentional.

#### JURISDICTION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT TO HEAR THE APPEAL

On January 9, 1967, appellant filed his notice of appeal with the Clerk of the United States District Court in Portland, Oregon.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.





5

APPELLANT'S STATEMENT OF THE CASE

On the evening of April 15, 1962, a fatal shooting occurred at appellee's cabin in Beatty, Oregon, a small village in the Indian Reservation in Klamath County. When officers from the Klamath County Sheriff's office arrived in response to a call from appellee's wife, they found the body of the deceased Tony Moore in a chair, and the appellee lying face down asleep on a bed.

The officers aroused appellee and he testified (Trial transcript, p. 25) to the following:

"A. He staggered around and finally got the pipe filled and looked at me and he said, 'I've got a gun and I'll shoot your guts out, you son of a bitch'.

Q. Then what happened -- where was he when he said that?

A. Standing by the bed.

Q. Then, did he say anything else after that?

A. Well, he raved on quite a little bit and turned around and observed Tony Moore sitting in the chair and he said, 'There is Tony' he says 'He got in my way and I had to kill him'. He said to me again, 'If I had my gun, I'd kill you too, you son of a bitch', that's the words he said."

Mrs. Walker, proprietor of the nearby cafe, was also present at that time and testified (Trial transcript, p. 102):

"Q. Did you hear any statements made in Mr. Unsworth's presence during the time that you were in the cabin either by Mr. Unsworth or by others?

A. Yes.





"Q. Would you relate those statements?

A. Well, Mr. Unsworth says, 'I shot Tony but I didn't mean to do it.'

Q. Any other statements?

A. He said, 'I meant to shoot her,' he meant his wife.

Q. Those are the exact words he used?

A. Well, he cussed at her."

None of the foregoing statements were elicited, but rather, according to all the witnesses were thoroughly spontaneous.

Appellee was taken into custody.

A few hours later, according to the testimony of Mr. Thomas, deputy district attorney, the following transpired in the jail barber shop (Trial Transcript, p. 220):

"Q. What time did this conversation take place?

A. It was approximately 5:00 in the morning, a.m.

Q. Would you relate that conversation?

A. I asked Mr. Unsworth several times as to what had happened and his answers were incoherent for the most part but he did say, "I killed him and I know you are going to get me." He asked many times to see his wife.

Q. What was his general attitude during the period of these conversations?

A. It was very aggressive and he was very wild and he shouted constantly and he was extremely noisy."

With respect to the same scene, Sheriff Brittan had testified (p. 208):

"A. He seemed to be a little wild and he seemed to be intoxicated."



Approximately twelve hours later, in the District Attorney's office, and after he was advised that anything he might say could be used against him, and that he had a right to call an attorney (Trial Transcript, p. 178), appellee gave a statement which was reduced to writing and signed. (Appendix A)

Before admitting the written statement into evidence, the court conducted a hearing out of the presence of the jury to determine its voluntariness. (Trial Transcript, p. 168) At the conclusion of the hearing (Trial Transcript, p. 174) the court stated:

"THE COURT: The issue before the Court is whether it was given voluntary or not. The Court feels that this is a jury question. The objection is overruled. Bring in the jury, please."

and allowed the exhibit to be received into evidence, with testimony pertaining to such voluntariness offered in the presence of the jury.

Petitioner's counsel objected to its introduction on the grounds that petitioner was held a full day without counsel, (Trial Transcript, p. 174), but made no objection to the fact that the court did not independently find on the issue of voluntariness, nor did he request the court to do so.

Petitioner himself elected to take the stand, and by his testimony substantially affirmed the content of the written statement. Petitioner's account of the events would show that he had been threatened earlier in the evening by Indians, that he heard a commotion outside, stepped out into the yard with his rifle cocked, and came back in still holding the





hammer down. His wife shouted at him to put the gun down, he turned and because of the absence of a thumb on the hand controlling the mechanism of a rifle, inadvertently let go; the rifle discharged, shooting Tony in the abdomen, and apparently killing almost instantly. Dr. Nicholson testified that the wound was a contact wound.

The state presented its case on two theories; that petitioner intended to kill Tony, or that he inadvertently killed Tony intending instead to kill his wife.

The court delivered comprehensive instructions, although none on intoxication at the time of oral admissions. Defense counsel, while objecting to instructions on intoxication relating to the commission of the crime and instructions on transferred intent, (Trial Transcript, p. 362), did not request any additional instructions.

The jury returned a verdict of second-degree murder.

## SPECIFICATIONS OF ERROR

### I

The District Court erred in holding that petitioner did not waive his constitutional rights to the introduction of his written statement (Appendix A) by taking the stand and testifying substantially in accord with the statement.

### II

The District Court erred in holding that petitioner was prejudiced by having to take the stand because the trial court did not make an independent determination of voluntariness of





the written statement (Appendix A) before allowing it in evidence.

### III

The District Court erred in holding that petitioner's oral statements (infra p. **5-6** ) at the time of arrest and in the jail barbershop were inadmissible in that petitioner was too intoxicated to make a voluntary admission.

### IV

The District Court erred in holding that petitioner was deprived of his constitutional rights when the court failed to instruct the jury to give less weight to statements made while under the influence of alcohol.

### V

The District Court erred in finding that the oral statements made at the time of arrest provided the basis for a verdict of second-degree murder.

### POINTS I and II and AUTHORITIES

By taking the stand and testifying to the same matters contained in his written statement, petitioner waived any objections he may have had to its introduction into evidence, and any rights he may have had to a judicial pre-determination of voluntariness.



Bell v. People, \_\_\_\_\_ Colo \_\_\_\_\_,  
406 P2d 681 (1965)

People v. Skidmore, 69 Ill App2d 483,  
217 NE2d 431 (1966)

State v. Dotson, 239 Or 140, 396 P2d 777 (1964)

State v. Frazier, \_\_\_\_\_ Or \_\_\_\_\_, 418 P2d  
841 (1966)

Washington v. People, \_\_\_\_\_ Colo \_\_\_\_\_, 405 P2d 735, (1965)  
cert. den. 383 US 953, \_\_\_\_\_ 16 L Ed2d 215, 86 S Ct 1217

The District Court held:

"I do not share the view that since Unsworth testified substantially in accord with his written statement, the statement was admissible regardless of whether he had been afforded his constitutional rights. Had Unsworth received a hearing outside the presence of the jury on the voluntariness of the oral and written statements, the State may have been unable to make a prima facie case, and it would have been unnecessary for Unsworth to have taken the stand."  
[District Court opinion, p. 8]

In support of its position that subsequent testimony to the same effect waives objections to the admission of a written statement, the Oregon Supreme Court relied on its holding in an earlier case, State v. Dotson, 239 Or 140, 396 P2d 777 (1964).

The theory, however, is amply supported by decisions from other jurisdictions. In Washington v. People, \_\_\_\_\_ Colo \_\_\_\_\_, 405 P2d 735, 738, cert. den. 383 US 953, where petitioner sought relief on the grounds that pre-trial statements were taken in violation of his constitutional rights, the Court held:





"Moreover, and completely decisive is the fact that Washington took the stand himself, and repeated substantially the same story he had told to Cloud. \* \* \* This situation was not one where he was required to take the stand in order to refute the effects of his pre-trial statements. Clearly, when the defendant elected to repeat to the jury his pre-trial statements, he waived every objection he might have urged to other proof by the prosecution of the same or similar statements."

See also Bell v. People, \_\_\_\_ Colo \_\_\_\_, 406 P2d 681 (1965).

An analysis of the situation itself supports the holding that appellee could not have been prejudiced by the introduction of the statement. The facts established a fatal shooting at the Unsworth cabin which, at the time, was occupied by only three persons. It is entirely predictable that Mrs. Unsworth would deny having fired the rifle. Assuming further, with little hesitancy, that the physical evidence would show the wound was not self-inflicted, it is equally predictable that suspicion would fall on appellee.

At this point, appellee had three alternatives; he might have refused to give a statement at all; he might have given a statement tending to show the shooting was intentional; or he might, as he in fact did, give an explanation consistent with the defense of pure accident.

Had Unsworth given no statement at all, or had the statement been kept out of evidence, the matter would have gone to the jury on the balance of the testimony and evidence that





the transcript has to offer. Whether or not Unsworth's exculpatory statements were better left unpresented is a matter of pure speculation. But in the absence of a clean showing that his story of accidental shooting was actually prejudicial, common sense unequivocally indicates otherwise.

Again, had the statement been incriminating, and Unsworth required to take the stand either to refute it or in contradiction in crucial particulars, the jury would have been confronted with a choice inevitably more prejudicial to the appellee.

When Unsworth took the stand and repeated the same exculpatory version as contained in his statement, we do not see, with respect nevertheless to the opinion of the District Court, either why it was necessary to do so (except to make his point more graphically), nor how he was prejudiced in any way at all.

Any further analysis merely belabors the point needlessly. Nor do the courts find the proposition that constitutional rights are waived under such circumstances any more than self-evident. In *People v. Skidmore*, 69 Ill App 2d 483, 217 NE2d 431, 433 (1966) the court held:

"Secondly, defendant objects to the fact that the court admitted the incriminating, signed statements given by the defendant to the police officers and the assistant state's attorney upon the grounds that constitutional privileges were violated because he was not afforded right to retain counsel, nor warned of his constitutional rights. \* \* \* we find defendant has no basis for this complaint in view of the fact that he himself took the witness stand and practically in detail reiterated under oath in the trial the matters contained



in these written statements. He was, therefore, not prejudiced and cannot claim constitutional privileges which he voluntarily waived by testifying."

Recently, the Oregon Court again in State v.

Frazier, \_\_\_\_ Or \_\_\_\_, 418 P2d 841, 844 (1966) merely reiterated the principle without further elaboration.

Appellee is claiming, in effect, a denial of constitutional rights in two areas. First that the statement was taken in violation of his rights (and admitted into evidence); and second, that the court did not independently determine voluntariness before allowing the jury to see it. However, in this particular situation, as in most, the concepts are inseparable and the distinction academic.

It is respectfully submitted that when appellee assumed the witness stand, he did so with competent counsel and of his own will; that by reiterating his prior statements he waived any and all constitutional rights he may have had with respect to the introduction into evidence of the statement.

### POINT III and AUTHORITIES

Appellee's oral statements made at the time of arrest, and in the jail barber shop were not inadmissible, even though appellee was intoxicated at the time.

Ballay v. People, \_\_\_\_ Colo \_\_\_\_, 419 P2d 446 (1966)

Bell v. United States, 60 App DC 76, 47 F2d 438 (1931)

Roper v. People, 116 Colo 493, 179 P2d 232, 233 (1947)





Mergner v. United States, 79 App DC 373,  
147 F2d 572 (1945)

Morton v. United States, 79 App DC 329,  
147 F2d 28 (1945)

People v. McQueen, 274 NYS2d 886,  
18 NY2d 337, 221 NE2d 550 (1966)

Peters v. Commonwealth, \_\_\_\_\_ Ky \_\_\_\_\_,  
403 SW2d 686 (1966)

26 Words and Phrases, Permanent Edition 527  
69 ALR 2d 362

All witnesses are in substantial accord that at the time the two groups of oral statements were made by appellee, he was drunk. The District Court held:

"The undisputed evidence shows that Unsworth at the time of his arrest was too intoxicated to make a voluntary statement and that the statements he made were 'the product of a mind benumbed or confused by alcohol, made at a time when the defendant himself had no understanding or realization of what was going on or what he was saying,' and therefore were inadmissible. McAfee v. United States, D.C. Cir. 1940, 111 F.2d 199, 200.

"In my opinion the failure of the trial court to exclude the oral statements made by Unsworth at the time of his arrest deprived him of due process. \* \* \*" [District Court opinion, p. 9]

We respectfully submit that the statements made, intoxicated or sober, were thoroughly spontaneous, and for that reason, thoroughly voluntary. The record shows no taint of coercion at any time. It may be that the issue with respect to these statements is one of credibility rather than voluntariness.

A statement made unreliable by coercive measures, and allowed in evidence, may violate a constitutional right.





But we argue that a question of reliability or credibility arising solely from intoxication goes merely to the weight to be given to the statements -- and that no due process question should arise as to its admissibility.

Essentially this, the majority rule, holds that intoxication alone, short of intoxication amounting to or resulting in mania, does not render confessions, admissions, or statements inadmissible. The earlier cases are collected and annotated in 69 ALR2d 362, including some federal cases. See *Bell v. United States*, 60 App DC 76, 47 F2d 438 (1931); *Mergner v. United States*, 79 App DC 373, 147 F2d 572 (1945); and *Morton v. United States*, 79 App DC 329, 147 F2d 38 (1945).

Later cases appear not to have deviated from this rule. The court held, in *Peters v. Commonwealth*, \_\_\_\_ Ky \_\_\_\_, 403 SW2d 686, 689 (1966):

"The fact that a person is intoxicated does not necessarily disable him from comprehending the intent of his admissions or from giving a true account of the occurrences to which they have reference. There is nothing in the record to indicate that because of his intoxication appellant was in a maniacal state. It is our view, too, that the jury could reasonably conclude appellant was not so intoxicated as to be unconscious of the meaning and effect of the words contained in his statement."

And see, to the same effect, *Ballay v. People*, \_\_\_\_ Colo \_\_\_\_, 419 P2d 446, 448 (1966), and *Roper v. People*, 116 Colo 493, 179 P2d 232, 233 (1947).

It may well be that most persons under the influence of alcohol have a tendency to bluff, exaggerate, threaten or swagger. This is by no means universal. Mr. Unsworth,



although he testified himself, put on no testimony at all either to deny his oral statements, explain them, or to give them an interpretation reflecting his personal tendencies during intoxication to exaggerate or bluff.

The jury, then, was left to color the statements in any manner dictated by its individual experience.

" \* \* \* It may well be that if there were evidence that the confessions had been compelled or coerced, evidence of intoxication would be relevant in conjunction therewith. Upon the other hand, in the absence of coercion, the jury might apply the ancient maxim in vino veritas." People v. McQueen, 274 N.Y.S.2d 886, 18 N.Y.2d 337, 221 NE2d 550, 554 (1966).

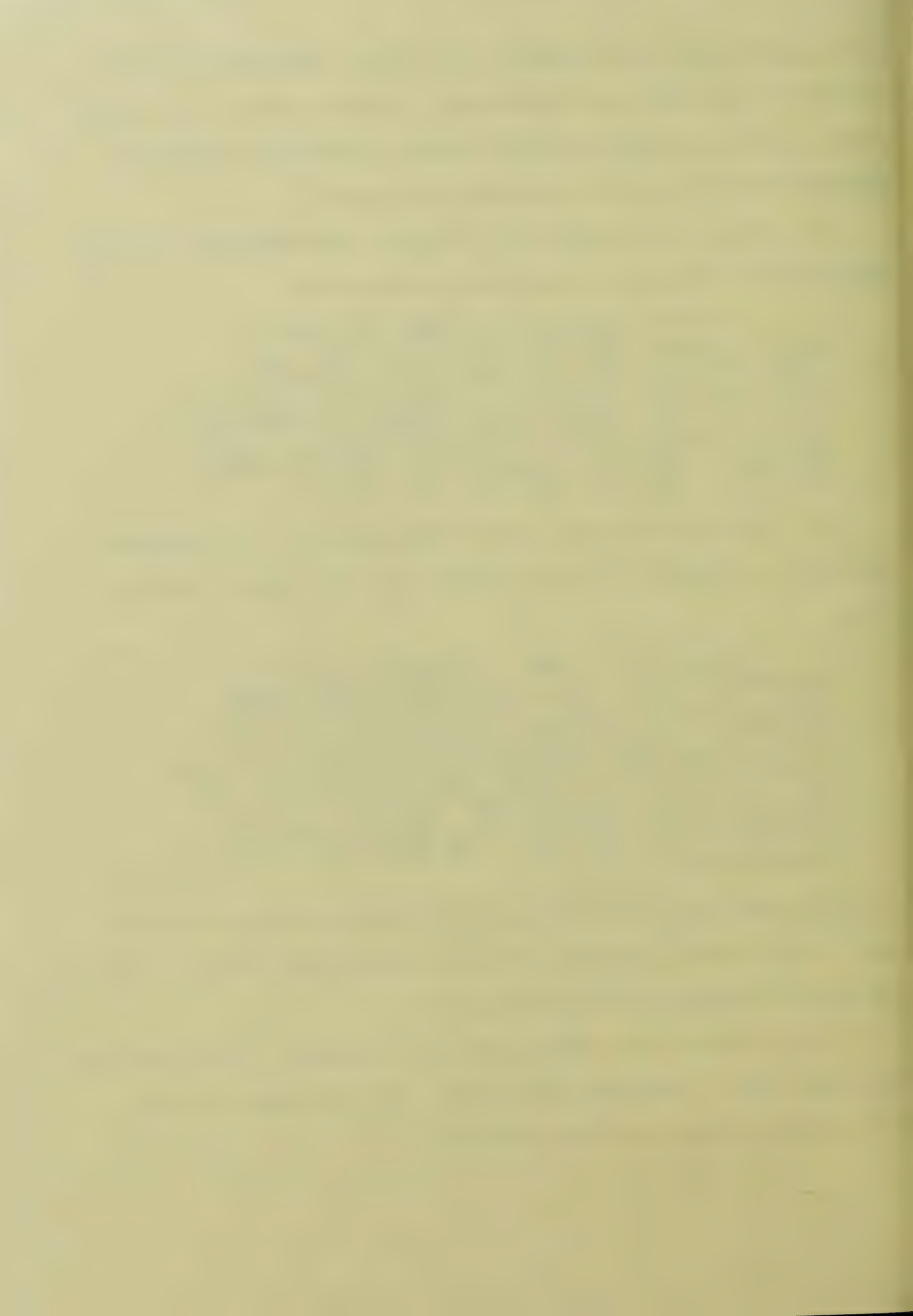
Nor does the evidence show that appellee's intoxication amounted to "mania" so as to render the statements inadmissible.

" 'Mania' is a form of insanity accompanied by more or less excitement which sometimes amounts to fury. The person so affected is subject to hallucinations and delusions and is impressed with the reality of events which have never occurred and things which do not exist and his actions are more or less in conformity with belief in these particulars. Dyar v. Dyar, 131 SE 535, 54, 161 Ga. 615." 26 Words and Phrases, Permanent Edition, 527.

If appellee was suffering from hallucinations or delirium, it is neither apparent from the record, nor easily inferred from the events of the evening.

In the absence of such a positive showing, it is submitted that appellee's statement made under the influence of wine were properly admitted into evidence.





17

POINT IV and AUTHORITIES

The trial court was not in error in failing to instruct the jury to give less weight to statements made while intoxicated, in the absence of a request for such instructions.

Claypole v. United States, 280 F2d 768  
(9th Cir. 1960)

Esters v. United States, 260 F2d 393  
(8th Cir. 1958)

State v. Ellis, 232 Or 70, 374 P2d 461  
(1962)

State v. Hudgens, \_\_\_\_ Ariz \_\_\_\_, 423 P2d  
90 (1967)

State v. Murray, 238 Or 567, 395 P2d 780  
(1964)

Ortis v. United States, 358 F2d 107  
(9th Cir 1966), cert. den. 385 US 861 (1966)

Williams v. United States, 358 F2d 325, 329  
(9th Cir 1966)

Federal Rules of Criminal Procedure, Title 18  
U.S.C. Rule 30

Oregon Revised Statutes 17.510

Appellee's trial counsel did not, according to the transcript and records available request any special instructions with respect to intoxication at the time of the oral admissions.

In the absence of such a request, the court is not bound to give any such instructions, and it is not reversible error not to do so. In fact, this principle is reflected in the Federal Rules of Criminal Procedure, Title 18 U.S.C., Rule 30 [as amended February 28, 1966, effective July 1, 1966]:





"\* \* \* No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. \* \* \*" (Emphasis supplied)

In Williams v. United States, 358 F2d 325, 329 (9th Cir 1966) where the trial judge did not properly instruct the jury concerning admissions and statements which were admitted into evidence, the court denied relief on this assignment of error, saying:

"\* \* \* No objection was interposed by appellant to the instructions which were given nor was any other instruction proposed by appellant.

"It is also to be noted that no question was raised by appellant at the trial that he was denied the assistance of counsel, or that he was not advised of his right to remain silent. In these circumstances we find no merit in appellant's contention."

And again, in Ortiz v. United States, 358 F2d 107, 109 (9th Cir 1966), cert. den. 385 US 861 (1966), where an informer's testimony may have been suspect:

"Appellant next contends that the failure of the court to give on its own motion a cautionary instruction that the informers' testimony should be viewed with great care and caution and carefully scrutinized was plain error. Appellant admits that the instruction was not requested by him. Under the circumstances we see no error in the failure to give such an instruction."

The same principle appears repeatedly in other jurisdictions, both by statute and by case law. Oregon Revised Statutes 17.510; Esters v. United States, 260 F2d 393 (8th Cir (1958)); Claypole v. United States, 280 F2d 768 (9th Cir 1960);





State v. Murray, 238 Or 567, 395 P2d 780 (1964); State v. Ellis, 232 Or 70, 374 P2d 461 (1962); State v. Hudgens, \_\_\_\_\_ Ariz \_\_\_\_\_, 423 P2d 90 (1967).

Even assuming, however, that such a failure to instruct, without a request, may be error so great as to amount to a denial of due process, an examination of the record itself would show enough instructions, considered as a whole, to caution the jury.

On page 356 (Trial Transcript), the Court instructed:

"Regarding the purported statements made by the defendant, the law provides that an admission of a defendant, whether in the court of a judicial proceeding or to a private person, cannot be given in evidence against him when made under the influence of fear produced by threats and when not freely or voluntarily made. You have heard the evidence of the facts and circumstances surrounding the statements and you are to determine from this evidence whether the statement was made under the influence of fear produced by threats or whether it was made freely and voluntarily. If the statement is voluntary, you are to give it whatever weight you feel it is entitled to, taking into consideration all of the facts and circumstances under which it was made. In other words, you are the exclusive judge of the weight and credibility of any admissions."

The foregoing instruction followed in the context of instructions, on p. 350 (Trial Transcript) which had provided:

"You are not restricted to a consideration of facts directly proved, nor are you expected to lay aside matters of common knowledge or your own observations and experiences in the affairs of life, but, on the contrary, you may give effect to such inferences as common knowledge or your personal observation and experience may reasonably draw from the facts directly proved and you may apply to conflicting testimony the test of your own judgment and experience."





Appellee was not denied due process by failure of the Court to instruct specially on intoxication.

#### POINT V

Unsworth's oral statements did not provide the only basis for a second-degree conviction.

Since the District Court did not specifically hold that the oral statements, per se, without the complications of intoxication, were insufficient to convict appellee, we do not at this time argue the sufficiency of the evidence.

However, the record shows that the jury had more to weigh than just the statements in question.

The state, in its rebuttal, produced the testimony of Deputy Sheriff Jack Hutton (Trial Transcript, beginning p. 26). Mr. Hutton testified that he had gone to the Unsworth home, had heard Unsworth threaten injury to his wife and specifically (p. 328):

"MR. McKEEN:

Q. When was the next time that you visited the Unsworths?

A. Three days later, the 18th.

Q. That was the 18th of November, 1961?

A. Yes.

Q. What if anything was said by Mrs. Unsworth -- Mr. Unsworth?

A. He told me that if I didn't get him out of there -- her out of there that he was going to kill her."





The state then called Lavina Henry, a neighbor of the Unsworths. (Trial Transcript, beginning p. 333). Mrs. Henry recounted several incidences of violence and fighting between the Unsworths, some of which were stricken. However, the unstricken portions again provided a basis from which the jury could find a malicious intent on the part of appellee towards his wife.

The jury then was positioned to weigh appellee's account of the incident as contained in his statement and testimony against his oral admissions and the testimony of the state's rebuttal witnesses.

It is apparent, with whatever factors played apart in the jury's consideration, that the latter offered greater credence.

#### CONCLUSION

It is respectfully urged that the District Court's Findings and Order be reversed, and the writ be denied.

Respectfully submitted,

ROBERT Y. THORNTON  
Attorney General of Oregon

HELEN B. KALIL  
Assistant Attorney General

Attorneys for Appellant

#### Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HELEN B. KALIL  
Assistant Attorney General



STATE OF OREGON

COUNTY OF KLAMATH

I, WILLIAM UNSWORTH, depose and say that the following statement is made freely and voluntarily and is true; that I have not been offered rewards or immunity of any kind; that the contents of this affidavit may be used at the trial of any action arising out of the facts set out herein; that this statement was made to Deputy District Attorney, J. R. Thomas, in the presence of Murray Britton, Sheriff of Klamath County, Oregon; Delbert Summers, Deputy Sheriff of Klamath County, Oregon, and Suzanne Cromwell, Stenographer, at 4:40 p.m., in the office of the District Attorney for Klamath County, Oregon, April 16, 1962.

J. R. THOMAS: Well, Bill I want you to understand that I am a Deputy District Attorney, and we are talking to you about a death of a fellow that we know as Anthony Moore, that occurred in Beatty in apparently the cabin that you and Mrs. Unsworth live in. That whatever you say can be used against you. You understand also that you have the right to call an attorney.

BILL UNSWORTH: I think I have the right to call an attorney, after all it is my life that is going to die too. It was not intentional, it was accidental. I went to the door and I had been threatened a couple times and I didn't know how many people were there. I had the gun in my hand and I cocked it and then when I saw that there wasn't anybody there and I was holding the hammer with my hand and I turned it back on safety or to safety. I turned around and my wife yelled at me and said, "put that damn thing down." When she hollared I was turned around towards Tony back into the kitchen. I had already





pulled the trigger and when she screamed at me I just let go of the trigger, or I mean the hammer.

Q: When you refer to a gun, which kind do you mean?

A: 30-30 Winchester.

Q: I want to show you a gun in the room and ask you if this is the one?

A: I guess this is it. I couldn't swear to it.

Q: Do you know it by serial number?

A: No. I didn't take notice of the serial number.

Q: Del Summers: On this gun is written 'Andy'. Do you know this was on it?

A: No, I didn't.

Q: Why don't you put your initials on it?

A: I don't know if this is the gun.

Q: Well, just put it on the gun so that we can identify it as the one in this statement. Where did you get the gun?

A: Bill Walker.

Murray Britton:

Q: Well, Bill Walker identified the gun last night as being the one he gave you.

A: Well he should know better than I do.

Murray Britton:

Q: We showed this gun to Bill Walker and he said this was the gun. Why don't you mark it so that we can identify this gun as the one in the statement?

A: There is an "X" on the left side. B.U. will be just as good. B. U. Bill Unsworth.

Q: Now go ahead with the incident in the cabin.

A: I just went to the door and I didn't know --





Q: How long had Tony been there that night?

A: Well, I don't know. We were sitting and talking and one thing and another and the dogs made quite a commotion and like I say when I turned away from the door and when the wife screamed at me that was it. I pulled the trigger and let the hammer down.

Q: How were you holding the gun?

A: Maybe I can show you better than I can tell you. Like I say, I pulled the trigger to let the hammer down. I had it in my left hand. I started to put the gun away and my wife hollared, "put that damn thing down" and like I say I had already pulled the trigger and I guess I just let my hand off the trigger and it just fired. I couldn't believe it.

Q: Let me ask you this? We had a report that you called someone about 9:30 and told them to get over there that there was going to be a killing. That you phoned from a telephone booth around Cookie's Tavern.

A: No, I didn't know there was going to be a shooting.

Q: Did you call the deputies in Bly?

A: Not that I know of.

Q: Do you recall making this statement to them?

A: I had a lot of trouble and I was upset. I don't remember you coming out and getting me. I remember when we got here and I know I was kind of belligerent and I told you I wasn't going to talk and there is another lapse and I can't account for.

Q: Now, the autopsy indicated that the wound was a contact wound. That the barrel was against him.

A: Well, I guess it was only about a foot from him and where I killed him.

Q: Wouldn't it have hit the arm of the chair?



- A: Well, the whole thing was like this. The door was here and I just turned around and that was when the wife hollared and was enough room that it was about a foot from him. It would have been that much space between the gun and him. (Indicating)
- Q: How far do you mean? A yard or so.
- A: Well, just right from him to me. (Indicating Sheriff) I can't believe I had shot him. I opened his shirt and I seen a red spot on him and then everything went to hell.
- Q: What did you do when you saw he was shot?
- A: I don't know what happened. Everything is pretty gone. I don't know.
- Q: Do you remember Jack Hunton and Jim Conroy coming in with Mr. and Mrs. Walker and your wife?
- A: I don't remember.
- Q: What is the next thing you remember?
- A: Just back here in the jail. Well, you introduced yourself as the District Attorney and you talked to me.
- Q: Did you have a fight with Tony?
- A: Hell no. I ask him up for dinner and we were working together and I said come on over to the house and have a bite to eat.
- Q: Had he been staying at your place?
- A: No. He had been over at Jimmy's, next door.
- Q: What time did he come over to your place?
- A: I don't know.
- Q: Did you have anything to drink?
- A: Wine.
- Q: How much, do you know?
- A: I don't know. It was either a fifth or a





half gallon and we just stopped at the store and took it home. We were sitting here drinking when all the commotion come on and the dogs made all the racket.

Q: You and he bought the wine together?

A: Yes.

Q: What store?

A: There is only one store. Crawfords and it was Crawfords Store. There is only one store and it is the only one there.

Q: Well, Bill, I want to ask you again about this. Do you remember making a phone call to either of the deputies in Bly that someone was going to get killed or something to that effect?

A: No.

Q: Do you remember being down there with the rifle?

A: No.

Q: What time did you start drinking?

A: About 4:00 o'clock. We worked over there cleaning up the yards. When we got done we went and got a jug and were going to have supper and have something to drink. Now you would have to ask my wife when we came home. She can tell you.

Q: Well, let me tell you this. The autopsy report indicates the wound that killed Anthony Moore was right up against his stomach. Now you have said you were approximately one yard away. Are you telling us everything?

A: Well, the uproar and everything. It could have been two or three inches. Well it isn't like you would notice in an uproar. To start with, I turned and judging from the door and where he was sitting I would turn I was a good ways from him and on the other hand, it might be that when I turned around and brought it might have been right up against him. I don't know.





(Deputy District Attorney J. R. Thomas left the room for approximately 1 minute. No conversation took place at this time)

Q: Now, I want you to tell us again about how far the rifle was when you shot him.

A: Like I told you. I was standing where the gun might have been a couple two or three inches. I don't remember.

Q: Do you remember when the two deputies Jack Hunton, Jim Conroy, Mr. and Mrs. Walker and your wife came to the cabin?

A: No.

Q: Do you remember saying anything to them about what had happened?

A: I don't remember anything from the time the gun went off and when we were sitting down here.

Q: How much had you been drinking that day? Just the fifth or half gallon of wine?

A: That was all. I didn't even have any money. I had to wait until Bill and Cookie came home to get some money.

Q: How many were sharing the wine?

A: Three. Tony, me and my wife.

Q: Tony, you and your wife?

A: Yes.

Q: This was all you had yesterday that you can remember?

A: Yes.

Q: I want to ask you again Bill. Did you have a fight with Tony?

A: Great God no. We didn't have any fight. I invited him to the house to have something to drink and eat.



Q: We said some people told us that you were around Cookies' with the rifle about 9:30.

A: No, I don't remember.

Q: Do you remember being down there before the gun went off?

A: Well, I worked for him during the day.

Q: What time did you quit work?

A: You will have to ask my wife. I don't remember.

Q: Can you give us an estimate?

A: My wife would know. She pays attention when I come home and she tries to have meals on time and so on and so she would know, where I don't.

Q: What do you do for Bill and Cookie Walker?

A: Well, I was breaking up the yard and cleaning up the yard. Now then if you don't mind could I talk to my wife. I mean after all I am not going to try to run off and I have tried to be cooperative. It is not going to be too long. I think I ought to have a lawyer of some kind and I will try to go along with you and do anything agreeable and Red here knows that I try to go along with everything and I will try to help you in any way I can and I would like to talk to my wife if I can.

Q: It is now 5:05 p.m. by my watch. Has anyone here or anyone else threatened you?

A: Hell no. Red wouldn't do that.

Q: Is this a voluntary statement?

A: Yes. This is a voluntary statement no one has threatened me all you want to know is what is the score. Nobody has threatened me and if they did they wouldn't get anything out of me. I am trying to do everything to help.

Q: Has anyone promised you any rewards or immunity, Bill?





A: Hell no. Red wouldn't do that. I told Red, if there is anything I do wrong then I am man enough to stand up and face up to what I get.

This statement consisting of five pages and this one, was given in the Office of the District Attorney for Klamath County, Oregon, April 16, 1962, at 4:40 p.m. and ended at 5:00 p.m.

This statement has been read by me and the truth as nearly as I can recall.

/s/ W.E. Unsworth

WITNESSES:

/s/ Murray Britton

/s/ Delbert Summers

/s/ J. R. Thomas

/s/ Suzanne Cromwell





No. 21,741

IN THE

United States Court of Appeals  
For the Ninth Circuit

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THE ANACONDA COMPANY,

*Appellant,*

VS.

GREAT FALLS MILL AND SMELTERMEN'S  
UNION No. 16 of the INTERNATIONAL  
UNION OF MINE, MILL AND SMELTER-  
WORKERS and THE INTERNATIONAL UNION  
OF MINE, MILL AND SMELTERWORKERS,

*Appellees.*

BRIEF OF APPELLANT

---

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FILED

FEB 5 1968

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WORKERS and THE INTERNATIONAL UNION  
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*Appellees.*

**BRIEF OF APPELLANT**

**STATEMENT OF JURISDICTION**

On September 29, 1965, the Appellees herein, plaintiffs below, filed a complaint in The United States District Court for the District of Montana seeking to enforce an arbitrator's award issued in favor of plaintiffs and against the Appellant, The Anaconda Company. (Tr. p. 4.) The Court below had jurisdiction of the subject matter as the complaint was founded upon Section 301 of the Labor-Management Relations Act of 1947—29 U.S.C. Section 185. After a pre-trial conference each side filed a motion for Summary Judgment. (Tr. pp. 67 and 76.) The

Court below entered Judgment in favor of plaintiffs (Tr. p. 87) and the defendant, The Anaconda Company, appealed (Tr. p. 89). This Court has jurisdiction under 28 U.S.C. Section 1291.

---

### **STATEMENT OF CASE**

This case arises from a dispute between the Appellant and certain of its employees, represented by the Appellees, over whether they were recalled to work properly following a wildcat strike in 1964 which forced closure of the Appellant's refinery at Great Falls, Montana, for a brief period.

The dispute stems from an incident occurring in January, 1964, following a breakdown in negotiations on rates of pay for employees engaged in the operation of a new vertical shaft furnace at Appellant's Great Falls plant when men assigned to this task declined to work and were discharged. Other employees struck in sympathy, a shutdown of operations resulted and was followed on January 31, 1964, by a written settlement of the strike which did not provide for order of recall of employees.

After settlement of the strike the Company, in an effort to get in production as rapidly as possible, recalled certain maintenance and repair workers to work ahead of some production workers of greater seniority. A grievance arose when these workers complained that they should have been recalled ahead of the maintenance and repair men although their tasks could not commence until the shut-down ma-



chinery and plant had been returned to operating condition.

When the grievance was not satisfactorily settled, the matter was submitted to arbitration before Mr. Thomas Tongue who was selected from a list of arbitrators supplied by the American Arbitration Association. (Tr. p. 5.)

The arbitrator was submitted the following question:

“Did the Company violate the seniority provisions of the collective bargaining agreement in recalling and assigning employees to work between January 30th and February 12th, 1964.”

He found that although the collective bargaining agreement (a copy of which is attached to Appellant's answer [Tr. p. 52]) speaks of recall after *layoffs* (emphasis added), there are no specific provisions relating to order of recalling employees after strikes (Tr. p. 7).

He then relied upon statements by union witnesses that the defendant's plant superintendent had said in response to union queries that the recall would be by departmental seniority to hold that because this was said it meant that the superintendent so interpreted the collective bargaining agreement and that therefore the company must be held as having so interpreted the agreement. (Tr. pp. 8 and 9.)

He also placed stress on the 1959 post-strike practice of recalling men in order of departmental seniority to reach his conclusion. (Tr. pp. 8 and 9.)

The arbitrator then gave his award as follows:

*"Award*

Based upon the considerations set forth above and good and sufficient reasons appearing therefor, it is the decision and award of the undersigned arbitrator as follows:

1. The company violated the seniority provisions of the collective bargaining agreement in recalling and assigning employees to work between January 30 and February 12, 1964, in that employees should have been recalled to work during the foregoing period in order of departmental seniority, but were not always recalled in that order.
2. The parties, in accordance with their stipulation of record, are to work out details relating to payment of back wages to any employees who were not recalled in proper order." (Tr. pp. 9 and 10.)

When the Appellant refused to comply with the award of the arbitrator, the Appellees instituted the instant action below which, after judgment for Plaintiffs and Appellees, resulted in this appeal.

---

**SPECIFICATION OF ERRORS**

**I**

The Court erred in finding that the arbitrator did not exceed the scope of the submission to him since the arbitrator's opinion plainly demonstrated that he could find no contract language to support his award

but, instead, relied on statements by a Company supervisor and a practice in 1959 in making his decision.

## II

The Court erred in holding that the arbitrator's award was ambiguous in that he might have construed the word "curtailment" to include strikes when the arbitrator's decision clearly indicates that he understood and appreciated the difference between "lay-offs" or curtailments and strikes.

## III

The Court erred in holding that the arbitrator was interpreting the contract in reaching his decision when the fair impact of his decision is that in the absence of contract language he determined how the men should have been recalled on a basis of one prior strike, the statements of agents of the parties and by establishing an estoppel against the Appellees and relying upon any contract language to support their later position in view of their prior statements.

## IV

That the Court erred in entering judgment for Appellees for the reason that the arbitrator exceeded the scope of the submission and made his award not upon contract language but upon his notion of how the recall should have been handled based upon the prior statements and actions of the parties or their agents.



**ARGUMENT  
SUMMARY**

Appellant's argument will be in two parts. The first portion will be addressed to the contention the arbitrator exceeded the scope of the submission and of his authority by basing his award not upon an interpretation of the meaning of contract language but rather upon his notion of what the parties agreed when the strike settlement accord of January 31, 1964, was reached.

The second portion of the argument will concern the proposition that the arbitrator's decision is not ambiguous and if construed to be an interpretation of the seniority provisions of the collective bargaining agreement is so unreasonable as to be arbitrary and capricious and therefore void.

---

**THE ARBITRATOR EXCEEDED THE SCOPE OF HIS SUBMISSION  
IN GOING OUTSIDE OF THE COLLECTIVE BARGAINING  
AGREEMENT TO MAKE HIS AWARD.**

The arbitrator in the course of his decision unequivocally found that no specific contract provisions relate to the order or recall of employees after strikes. (Tr. p. 7.) Equally important he did not designate any portion of the contract which he thought might be interpreted to govern recall after strikes.

He did, however, find three circumstances significant:

1. That a Company superintendent had stated that departmental seniority would be observed during the post-strike recall (Tr. p. 8);

2. That the union representatives did not request or insist upon plant seniority as the proper order of recall (Tr. p. 8); and

3. That following the 1959 strike the Company followed departmental seniority in its order of recall (Tr. p. 8).

Basing his decision upon these three circumstances, the arbitrator found that (1) because the Company representatives had said departmental seniority would be observed the Company must be held as having so interpreted the agreement and (2) because the unions had apparently acquiesced in such order of recall, they were estopped to later argue for plant seniority. (Tr. p. 9.)

A fair reading of the arbitrator's decision impels the conclusion that it is based not upon any contract language but rather upon his belief that the parties had at their January 31, 1964, meeting by their words and conduct entered into an agreement as to the order of recall.

While he may have been correct in reaching such conclusion, this was not the question he was to answer which was in essence had the Company violated any provision of the existing collective bargaining agreement in its recall of strikers. Nor did he answer this question by indicating his understanding of the different constructions placed in the agreement by the parties since the question related to what the contract actually provided rather than who should be estopped by words or conduct.



Since it is so apparent that the arbitrator did not draw his award from the essence of the bargaining agreement itself but rather from the conduct of the parties it is submitted that *Steelworkers v. Enterprise Corporation*, 363 U.S. 593 is controlling in light of the holding at p. 597 as follows:

“\* \* \* Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.”

The corollary notion was expressed in *Corey v. General Electric Company*, 315 F. 2d 499 at p. 508 where it is said:

“\* \* \* Should his decision or the remedy exceed the bounds of his authority as established by the collective bargaining agreement, that abuse of authority is remediable in an action to vacate the award.”

See also:

*The Torrington Co. v. Metal Products Workers Union*, 237 F. Supp. 139.

While there is no contention that Mr. Tongue did not labor mightily to do equity in his award, the present dispute reveals the evils inherent in the practice of arbitrators attempting to dispense their brand



of industrial justice which was scored in *Steelworkers v. Enterprise Corp.*, supra.

Beyond doubt the problems resulting from attempting to reactivate a struck or shut-down plant are so different from those flowing from the reversal of a curtailment or lay-off as to preclude any attempt to make an agreement with respect to one situation applicable to the other.

The wisdom behind the policy denying an arbitrator the right to determine what the parties would have agreed to in a situation they did not contemplate but which has occurred cannot be more graphically demonstrated than in the present case.

The problems arising from reopening of a struck plant, such as repair of plant prior to engaging in production and related matters indicate that the subject of priority of recall is one for negotiation between employer and union rather than for subjective determination by an arbitrator, however fairly motivated.

The parties bargained for an arbitrator to interpret their agreement not to fashion one to cover an unanticipated hiatus. For these reasons the arbitrator's award should be vacated.

---

#### THE ARBITRATOR'S DECISION IS NOT AMBIGUOUS

The Court below in concluding that the arbitrator might have read the word "curtailment" to include strike went to the provisions of Section 7 of Article

7 of the collective bargaining agreement to sustain this position. (Tr. p. 84.)

This provision in pertinent part reads:

“Section 7. Layoffs in a Department:

(a) When it is necessary to curtail the work force in a department or a department subdivision, the employee at the bottom of the applicable seniority list shall be the first to be curtailed. His plant seniority shall then govern as to whether he shall be retained in the plant or curtailed from the plant. The Company will furnish the local Union a list of those employees who are laid off.

(b) In recalling employees after a curtailment, they shall be recalled as closely as possible in the reverse order to that described in part (a) of this Section, provided they can perform the work available.”

A reading of the section can leave no doubt that the situation resulting from strike or other shutdown is not contemplated nor intended to be provided for in this part of the agreement.

Even so there might be room to feel that such construction of the arbitrator's decision were possible were it not for his unqualified expression to the contrary when he says in his award:

“. . . Suffice to say for the purposes of this case that they provide, among other things, for both ‘plant seniority “and” departmental seniority’; that in the event of *layoffs* in a department, plant seniority is to prevail in recalling em-

ployees to work, and that there are no specific provisions relating to order of recalling employees after *strikes*." (Tr. p. 7; emphasis added.)

It is submitted that nothing could better reveal the awareness of the arbitrator of the distinction between "lay-off" and "strike" than his own review of the contract seniority provisions.

Since the arbitrator does not seek to identify any portion of the collective bargaining agreement as compelling his decision, we submit that the Court below is in no better position to do so.

---

### CONCLUSION

Appellant submits that an objective reading of the arbitrator's award requires a conclusion that it is based upon his subjective judgment as to what was fair based upon the statements and conduct of the parties rather than upon any formal collective agreement. As such, the award must fall as it does not flow from the essence of the collective bargaining agreement and exceeds the scope of the submission.

Further, the decision of the arbitrator is not ambiguous and, if deemed to be a construction of Section 7 of Article 7, is so unreasonable as to be arbitrary or capricious. See *International Association of Machinists v. Hayes Corp.*, 296 Fed. 2d 238 at p. 243.



We urge this Court then to reverse the Judgment of the Court below and to vacate the Arbitrator's award for the reasons advanced.

Dated, Butte, Montana,  
February 1, 1968.

Respectfully submitted,  
R. LEWIS BROWN, JR.,  
*Attorney for Appellant.*

---

#### CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeal for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. LEWIS BROWN, JR.,  
*Attorney for Appellant.*

No. 21,741

IN THE

United States Court of Appeals  
For the Ninth Circuit

THE ANACONDA COMPANY,

*Appellant,*

VS.

GREAT FALLS MILL AND SMELTERMEN'S UNION  
No. 16 of the INTERNATIONAL UNION OF  
MINE, MILL AND SMELTERWORKERS, and THE  
INTERNATIONAL UNION OF MINE, MILL AND  
SMELTERWORKERS,

*Appellees.*

BRIEF OF APPELLEES

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INTERNATIONAL UNION OF MINE, MILL AND  
SMELTERWORKERS,

*Appellees.*

**BRIEF OF APPELLEES**

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**STATEMENT OF JURISDICTION**

Appellees concur in appellant's statement of jurisdiction.

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**STATEMENT OF THE CASE**

Appellees do not concur in the statement of the case prepared by appellant in the following respects:

1. The work stoppage was not a "wildcat" strike (Ap. B. p. 2). It resulted from inability to negotiate rates on new jobs (Tr. p. 7) and resultant economic coercion on the part of the employer (Tr. p. 8) which



included a general discharge—although the arbitrator characterized the work stoppage as a strike (Tr. p. 7). While not relevant to this appeal, the stoppage was not a “wildcat” strike, but a protected economic activity.

2. Appellant glosses over the circumstances surrounding the settlement of the work stoppage and neglects to state that the basis for the original grievance came upon the union’s insistence that the company had agreed to recall men on the basis of seniority in the settlement of the strike; the union contending that the employer had agreed to recall on plant seniority basis and the employer contending for recall on a departmental seniority basis and claimed to have recalled on such basis. On the issue the arbitration resulted (Tr. p. 8).

3. Appellant’s analysis of the arbitrator’s decision is argumentative and has no proper place in the statement of the case; and must be viewed in the proper factual perspective. The issue upon which the arbitrator was called was whether or not the employer had applied the seniority provisions of the agreement in the recall. The union contended that plant seniority should have been applied (Tr. p. 8). The arbitrator found that departmental seniority had been agreed to and that the employer had failed to correctly apply it (Tr. pp. 7-10).

At the time of submission to the arbitrator the parties stipulated that the mechanics of computing return dates and seniority dates was sufficiently automatic as to require no specific decisions thereon by the

arbitrator, should he rule in favor of the union (Tr. pp. 7-10).

4. The collective agreement which bottoms the arbitration makes specific reference to the scope and binding effect of arbitration (Tr. p. 54, Art. 8, §§ 6, 7).

“§ 6. Matter to be Considered by Arbitrator:

In considering the application and interpretation of any provision of this agreement as it relates to the grievance submitted to arbitration, the arbitrator may also consider rules or regulations covering working practices and working conditions which have been established by custom or local agreement.”

“§ 7. Decision of Arbitrator:

All decisions rendered as a result of any arbitration proceedings provided for herein shall be final and binding upon both parties.”

---

### ARGUMENT SUMMARY

Appellant fails to set forth the context of the submission and thereby seeks to alter the reach of the matter submitted to the arbitrator, and a review of the arbitration itself.

The arbitrator's scope is established by the collective bargaining as well as the submission question, and the District Court correctly refused to reexamine the arbitration itself beyond inquiry into any want of fidelity to his obligation by the arbitrator.

Judicial review of arbitration should, and here correctly did, confine itself to inquiry into the existence



or nonexistence of an arbitration fairly considered by the arbitrator and operating within the framework of the collective bargaining agreement. Judicial substantive concurrence in the award is not a requirement for its validity.

---

## SPECIFICATIONS OF ERROR

### SCOPE OF ARBITRATORS

While listing four specifications, appellant divides argument into two general areas; and it appears that specifications I and IV and specifications II and III cover the same ground.

On I and IV, appellant argues that the court erred in holding that the arbitrator did not exceed the scope of his authority. Whether or not there was any specific contract term for application of seniority to the recall begs the question presented to the arbitrator. The scope of the arbitrator's authority is found in the collective bargaining agreement (Tr. p. 54) and not solely in the question submitted. Were the latter the case, however, the evidence presented by the company that it had not recalled in all cases according to seniority (Tr. p. 8) would suffice to support the award.

For the issue before the arbitrator was not whether in all strikes or stoppages the seniority provisions of the contract should be applied, but only whether under the particular circumstances of this dispute the company failed to apply the seniority provisions as agreed to in the resolution of the particular dispute. That was the question presented and that was the issue resolved. The lower court correctly sustained the award and re-



fused to reexamine the issues in arbitration. As the court stated in its holding in *Local 77, Musicians v. Orchestra Assn.*, 252 F. Supp. 787:

“It [the award] resolved the exact question which was submitted in terms of the contract and its interpretation; it is therefore not subject to re-examination on the merits.”

What appellant seeks here, and sought below, is a review of the merits in the absence of the record before the arbitrator. If the courts are to so do, it is submitted that, rather than the piecemeal review raised by appellant's specifications and argument here, the entire record should be reviewed.<sup>1</sup> Now appellant seeks to have unilaterally reviewed a part of its contention before the arbitrator. A contention advanced to support its position that it had not agreed to apply seniority on recall. If the company's contention merits review, then the union's contention that the men were discharged and therefore plant seniority should apply should also have been reviewed.

But appellees recognize that under the rules of the collective bargaining agreement the arbitrator's decision is final and binding and that endless reviews serve only to defeat the whole purpose of arbitration.

Thus, the specifications of error are not, in fact, directed at any error on the part of the District Court,

---

<sup>1</sup>It is obvious from the record that the initial contention of the union was not supported by the award. They had contended for application of plant seniority and that this was their understanding at the time of resolution of the initial dispute when the company agreed it would recall the men by seniority. The arbitrator simply found that the employer did not apply seniority and so ruled.

but complaints of error on the part of the arbitrator—a back door review of the arbitration decision itself.

For instance, in specification number I appellant bases a scope of submission argument on the pretense that the arbitrator stated he found “no contract language to support his award.” In fact the arbitrator states that the recall after strike situation is not specifically provided for, but goes on to say that the circumstances evidenced in this situation gave rise to the conclusion that the company “so interpreted the collective bargaining agreement” (Tr. p. 9); and wherein lies the arbitrator’s error in relying upon agreements of the company agent and a past 1959 strike practice when the collective bargaining agreement itself spells out that these very matters may be always considered by the arbitrator (Tr. p. 54, Contract Art. 8, § 6).

Appellant cites *Carey v. General Elec. Co.*, 315 F. 2d 499, 508, wherein the court points out that the bounds of authority “as established in the collective bargaining agreement” should not be abused by arbitrators.

Again, appellant cites *Fomington Co. v. Metal Product Workers Union*, 237 F. Supp. 139. While distinguishable, and while appellees are not wholly in accord with that District Court ruling, it is significant that even there the bounds were premised upon the collective bargaining agreement.

Specification II is premised on a misstatement of the District Court holding. Nowhere does the court hold (or state) that the arbitrator’s award was ambiguous. The court speculated on how the arbitrator



might have construed certain contract terms, but held (Tr. p. 35) that the first paragraph of the award was valid and binding upon both parties. In the speculation the court stated, not that the award was ambiguous, but that the arbitrator could reasonably and conceivably have made certain interpretations and that the court would not substitute its own opinion for that of the arbitrator (Tr. pp. 34, 35) and that the arbitrator's view did not demonstrate any infidelity to his obligation (Tr. p. 35).

At bottom, however, all the specifications rest upon a hypertechnical approach to the function of the arbitrator; an approach more in keeping with the old case by case system which preceded the adoption in collective bargaining agreements of general arbitration procedures as interim means of resolving disputes during a contract term; and as a substitute for strike actions in the non-economic dispute areas. That narrow doctrine was presumably laid to rest with *Lincoln Mills* and the *Steelworker* trilogy.

*Textile Workers v. Lincoln Mills* (1957) 353 U.S. 448;

*Steelworkers v. Warrior Navigation Co.*, 363 U.S. 574;

*Steelworkers v. American Mfg. Co.*, 363 U.S. 564;

*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593.

The specifications then, are merely an attempt to obtain a piecemeal review of the arbitration decision and award.



### THE SCOPE OF JUDICIAL REVIEW

Inferentially, the appellant charges the District Court with error for not confining the arbitrator to the submission question. Yet this is precisely what the lower court did; and decided that the arbitrator could, without exceeding an arbitrator's authority, rule and award as he did. In so doing the District Court correctly applied the *Enterprise* case rule.

While not wishing to go beyond the District Court decision, it is submitted that the appellant seeks to expand the specific question submitted by changing the context of its submission. If confined to the specific question, the admission by appellant of failure to follow either seniority list en toto, supports an award to appellees' members.

But the decisions go beyond this narrow definition of an arbitrator's role, and look for basis of abuse of privilege to the collective bargaining agreement itself to define its scope of review. And where the arbitrator is not confined by specific limitation in his examination of a dispute, the courts do not add any such limitation. An intent to limit must be spelled out, *Local 1401 Retail Clerks v. Woodman's Food Mkt.*, 371 F. 2d 199.

In this case the arbitrator's scope is generalized by the terms of the collective bargaining agreement itself (Tr. p. 54, Art. 8, § 6).

Thus, in this case the District Court, if it erred at all, erred in confining the review to a scope even more restricted than the agreement. (Non-prejudicial to appellant.)

At the same time the District Court quite correctly refused to second guess the arbitrator by overly precise inquiry into the decision. An arbitrator need not even write a decision, or “give their reasons for an award”, *Steelworkers v. Enterprise Wheel*, 363 U.S. 593; and the District Court gave reasonably full play to the means of dispute settlement chosen by the parties under the collective bargaining contract, bounding that procedure only with the fundamental precepts of fair play.

While in this case a more narrow inquiry was made by the District Court, even within that scope, it cannot be held that the court erred in not reopening a portion of the record only. Here, the court seemed to confine its inquiry to the language of the seniority clause rather than the scope of arbitration provided in the grievance clause. In so doing, the court finds that the arbitrator’s analysis and conclusion is not unreasonable, biased, incredible, or any of the other adverbs which would indicate an infidelity to his obligation to arbitrate. As the United States Supreme Court implied and this court has stated, the parties chose the arbitrator to decide the dispute; not the judge.

*Metal Trades Council v. General Electric Co.*  
(CC 9, 1965) 353 F. 2d 302.

“It is not for this Court to say what the Board of Arbitration should do. That is up to the board, because under the Warrior and other cases, this Court cannot substitute its determination for the determination of the Board of Arbitration. That is what they bargained for in the collective bar-



gaining agreement, that industrial peace was to follow the adoption of a contract of that kind which contemplates that you will secure not only the services of the arbitrator but also their know-how, their knowledge of the industry, their ability to know and to follow the rules applicable to labor negotiations.”

There is no allegation here that the contract provides limitations on the arbitration; nor argument of partiality or corruption. *Cf. Local 1078 U.A.W. v. Anaconda Brass Co.*, 256 F. Supp. 686. Nor any manifest disregard of the law. *Wilks v. Swan*, 346 U.S. 427, 436.

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### CONCLUSION

It is manifestly correct that in the great majority of arbitrations, neither party wins a clear-cut victory. Problems so obviously determinable are rarely arbitrated.

And today, under the doctrine of the *Steelworkers* trilogy, the arbitrator becomes an integral part of the collective bargaining process. While in the instant case, the issue was clearly drawn, the argument sought by appellant would, in other cases, seek to make technical wording of the submission question override even the contractual premises of arbitration. To accord such weight to the question framed (where contract terms are not specifically modified) would make hazardous and overly encumbered by technicalities what is supposed to be a simple, speedy, and



peaceful procedure for settling disputes. Moreover, it would require a complete court review of each situation.

By unduly hampering the process by raising interpretive issues in each case, such a rule would in effect permit inferential amendment of the general obligation to arbitrate in each case. *Cf. Socony Vacuum Tanker Assn. v. Socony Mobil*, 369 F. 2d 480.

The District Court restrained its review, and refused to become a substantive appellate court for arbitration. In so doing it ruled correctly and should be sustained.

Dated, Helena, Montana,  
February 24, 1968.

Respectfully submitted,  
CHARLES V. HUPPE,  
*Attorney for Appellees.*

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#### CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES V. HUPPE,  
*Attorney for Appellees.*



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In the United States Court of Appeals  
for the Ninth Circuit

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BUTCHERS' UNION LOCAL No. 120, AMALGAMATED  
MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH  
AMERICA, AFL-CIO, RESPONDENT

---

On Petition for Enforcement of an Order of the  
National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD

---

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**In the United States Court of Appeals  
for the Ninth Circuit**

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No. 21742

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

BUTCHERS' UNION LOCAL No. 120, AMALGAMATED  
MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH  
AMERICA, AFL-CIO, RESPONDENT

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**On Petition for Enforcement of an Order of the  
National Labor Relations Board**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD**

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**JURISDICTION**

This case is before the Court upon the petition of the Board for enforcement of its order (R. 30-37)<sup>1</sup>

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<sup>1</sup> References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of the Court's rules. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. "GX" refers to the General Counsel's exhibits; "RX" refers to respondent's exhibits.



issued against respondent on September 29, 1966, and reported at 160 NLRB No. 114. The Board's order resulted from routine proceedings under the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*). This Court has jurisdiction, since the unfair labor practice occurred in Oakland, California.

## STATEMENT OF THE CASE

### I. The Board's Findings of Fact

The Board found that respondent violated Section 8(b) (7) (C) of the Act by picketing an employer with an object of forcing or requiring him to recognize and bargain with respondent as the collective bargaining representative of his employees without filing a petition for a Board election under Section 9(c) of the Act within a reasonable period of time from the commencement of the picketing. The evidence upon which the Board based its finding is summarized below.

John Pacheco, the sole owner of M. Moniz Portuguese Sausage Factory, is engaged in the manufacture and sale of sausages at Oakland, California (R. 12, 31). Pacheco himself directs the business; in addition, at all material times, three men were engaged in the factory as production and maintenance workers and one outside truckdriver handled the wholesale sale and delivery of sausages (R. 14, 31; Tr. 49). Of the three production workers, two were sons-in-law of Pacheco (R. 14; Tr. 49). The third was not actually a relative, but Pacheco was godfather to his five children (*ibid.*). Pacheco paid him a salary of \$125 a week

(R. 33; Tr. 54). In addition, Pacheco paid him and his other employees, from time to time, additional sums from the business as a reimbursement for medical, dental, hospital, automobile and other expenses. There was, however, no partnership agreement or any other arrangement whereby these individuals were entitled to a certain percentage of profits. (R. 33; Tr. 52-53.)

No pension fund arrangement exists but Pacheco makes appropriate deductions for Social Security and Workmen's Compensation (R. 33; Tr. 50-51). Pacheco explained at the Board hearing that he had a close working relationship with all his employees:

We hold meetings and try to save here and there. We discuss the business in general. I don't make the decisions alone. I discuss them with them. [Tr. 53.]

But, if a dispute arises, it is Pacheco who makes the ultimate decision (Tr. 54).

During late 1964, Sylvan Thornton, a Union officer, visited Pacheco and told him that he wanted to "unionize the shop." Pacheco replied that "that was all right" and invited Thornton to "go back and talk to the employees and if they agreed it was fine." Thornton refused, and insisted that he was going to talk only to Pacheco (R. 13; Tr. 33). Pacheco, however, refused to recognize the Union unless his employees consented.

On September 30, 1965, Thornton visited Pacheco again and insisted that he sign a contract with the Union. Again, Pacheco told him to talk to the em-



ployees and stated that "... if they wanted the Union, I would agree." Thornton answered that he was not interested in talking to employees (R. 13; Tr. 36-37). When Pacheco refused to sign, Thornton said that he could make things unpleasant (R. 32; Tr. 16). Pacheco asked Thornton to explain the details of the Union contract and Thornton left but promised that the document would be brought to Pacheco (R. 13; Tr. 37). Within a few days, the Union had pickets outside the Company's premises. See p. 5, *infra*.

Union business agent Finney came to Pacheco's shop on October 13, 1965, and showed him a contract, but Finney declined to discuss its contents on the grounds that Thornton had ordered him "not to talk" (Tr. 38). The next day, after speaking to a labor relations consultant, Pacheco telephoned Thornton and asked him to come to his shop with a contract and to explain it because he "was interested in the details" (Tr. 41). When Thornton appeared, however, and the two men sat down with the document before them, Thornton declined to discuss the matter any further: he told Pacheco that he had already left the agreement, that Pacheco had already read it, and that "there was nothing to explain, but to sign the contract" (Tr. 42).



Pacheco replied, "Okay, my back's against the wall" and asked Thornton to date and execute the contract. When Thornton complied and returned the signed document to Pacheco, Pacheco put it in his office safe, locked the door, and refused to return it to the irate business agent (R. 14; Tr. 42).

Meanwhile, the Union had commenced picketing at Pacheco's premises, on October 1 or 4, 1965. The picket signs bore the following legend:

MONIZ LINGUICA  
UNFAIR

THE EMPLOYER PROVIDES WAGES AND WORKING  
CONDITIONS FOR EMPLOYEES BELOW PREVAILING  
STANDARDS ESTABLISHED BY BUTCHERS 120  
PLEASE DO NOT BUY PRODUCTS PREPARED,  
PROCESSED AND PACKAGED BY THE ABOVE EMPLOYER,  
UNDER THE BRAND NAME OF MONIZ

Picketing continued intermittently until December 15, 1965 (R. 32; Tr. 6).<sup>2</sup>

On November 8, 1965, Pacheco filed the instant Board charges and a petition for a representation election (R. 32; Tr. 7). On December 23, 1965, the Company requested that its petition for an election be withdrawn on the grounds that by this time the Union had disclaimed any interest in representing the employees (R. 13, 32; RX 3). The request was approved by the Board's Regional Director who noted

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<sup>2</sup> On December 20, 1965, the United States District Court for the Northern District of California issued a temporary injunction pursuant to Section 10(1) of the Act. *Hoffman v. Butchers' Union, Local No. 120, etc.*, Civil No. 44496.

that the Union had, in fact, made such a disclaimer after Board proceedings herein had commenced (*ibid.*).

## II. The Board's Conclusions and Order

The Board found that an object of respondent's picketing was to force or require the Company to recognize and bargain with the Union, although it was never the certified representative of the Company's employees (R. 34). The Board further found that no representation petition was filed "within . . . thirty days from the commencement of such picketing" (*ibid.*). Accordingly, the Board concluded that respondent violated Section 8(b)(7)(C) of the Act and ordered respondent to cease and desist therefrom and to post an appropriate notice (R. 35-36).

## ARGUMENT

### I. Substantial Evidence Supports the Board's Finding That Respondent's Picketing Was for an Object Proscribed in Section 8(b)(7)

The Congressional restrictions imposed upon picketing by an uncertified union, in Section 8(b)(7), apply only where "an object thereof" is to force an employer to recognize or bargain with a union, or to force employees to accept such union as their collective bargaining representative. The threshold issue in this case, therefore, is whether there is adequate evidentiary support under the applicable standards of judicial review<sup>3</sup> for the Board's finding that the pick-

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<sup>3</sup> See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474; *N.L.R.B. v. Carpenters Local No. 2133*, 356 F. 2d 464 (C.A. 9).



eting in this case was for such an object. In attacking this Board finding, respondent has contended that the sole object of the picketing was merely to publicize the "substandard" working conditions of Pacheco's employees.

In the Board's view, picketing to induce an employer to raise wage rates up to area standards need not be equated with a recognition or organization object. *Houston Building and Construction Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321, 322-323; *Local 741, Plumbing and Pipefitting etc. (Keith Riggs)*, 137 NLRB 1125; see *Carpenters Local No. 2133, supra*, 356 F. 2d at 466 n. 1. The question of whether a proscribed object exists must be determined by the Board on the facts of each case.

In this case, the record amply supports the Board's determination: picketing began immediately after Pacheco had refused the Union's September 30 demand to sign a collective bargaining contract, and after Union agent Thornton had threatened to make things "unpleasant" for Pacheco if he refused. It is true that the picket signs themselves did not expressly call out for recognition but this obviously cannot preclude the Board from drawing an appropriate inference from all the surrounding circumstances. *N.L.R.B. v. Local 182, Teamsters*, 314 F. 2d 53, 58 (C.A. 2). There is nothing in the record to show that the Union had any genuine concern about the nature of the working conditions among Pacheco's employees; indeed, there is no evidence that the Union even knew



what they were.<sup>4</sup> It is clear that Union officials repeatedly refused to talk about the benefits of organization with the *employees*; they insisted instead on dealing with “the owner” (*supra*, pp. 3-4). And all the testimony in the record relating to those dealings shows that the Union wanted recognition; there was never any inquiry about existing working conditions.

In these circumstances, the Board’s finding of a Section 8(b)(7) object is plainly entitled to affirmation. *N.L.R.B. v. Carpenters Local No. 2133, etc.*, 356 F. 2d 464 (C.A. 9); *N.L.R.B. v. Local Joint Executive Board of Hotel and Restaurant Employees*, 301 F. 2d 149, 153-154 (C.A. 9); *Centralia Building and Construction Trades Council v. N.L.R.B.*, 363 F. 2d 699 (C.A. D.C.); *N.L.R.B. v. Sapulpa Typographical Union No. 619*, 321 F. 2d 771, 774 (C.A. 10); *N.L.R.B. v. Bldg. & Const. Trades Council of Philadelphia*, 359 F. 2d 62, 63 (C.A. 3).<sup>5</sup>

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<sup>4</sup> During the conversation between Pacheco and Finney on October 13, 1965, the record shows that Finney did accuse him of “not paying Union scale” (Tr. 39). But when Pacheco protested—“How do you know? Have you seen my payroll, my books?”—Finney backed down and conceded, “I can’t talk to you. I don’t know nothing” (Tr. 39).

<sup>5</sup> The Board is not required, of course, to find that recognition was the *only* object; the Act applies when this is *an* object. *Local 182, Teamsters, supra*, 314 F. 2d at 58-59; *Penello v. Retail Store Employees*, 188 F. Supp. 192, 199 (D.C. Md.), *aff’d* 287 F. 2d 509 (C.A. 4); *Local 705, Teamsters v. N.L.R.B.*, 307 F. 2d 197, 198 (C.A. D.C.). Accordingly, no defense would be proved even if it were shown that the Union *also* sought to create some notoriety about Pacheco’s employees’ working conditions.

Before the Board, respondent contended that the Trial Examiner had erred in failing to find "entrapment" (R. 29). According to respondent, Pacheco duped the Union into delivering a signed bargaining contract on October 14, which Pacheco then secreted for use as evidence against the Union in these proceedings. But the charge of entrapment must fail. The record does not show that Pacheco did anything to initiate the discussions about a collective bargaining contract or to induce the Union to engage in any conduct which would misrepresent its true object. At the worst, Pacheco's conduct did not "trap" the Union by creating a false impression of the Union's object but only by creating a situation in which written evidence of its true object could be obtained. Besides, the Board pointed out that it was not relying upon this written evidence, in any event. The signed contract which Pacheco had obtained was, after all, unnecessary, and the Board rested its finding of object on the Union's earlier demand for recognition (R. 34, n. 5). It was undisputed at the Board hearing that the Union had demanded, on September 30, 1965, that Pacheco sign a contract or else face "unpleasant" consequences.<sup>6</sup>

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<sup>6</sup> Nor did the Board rely upon the evidence of a 1964 demand for recognition (*supra*, p. 3). This episode occurred more than six months before the instant unfair labor practice charge was filed and was before the Board solely for background purposes (Tr. 32-33). See *Local Lodge No. 1424 v. N.L.R.B.*, 362 U.S. 411, 416.



**II. The Board's Policy Against Finding a Section 8(b)(7) (C) Violation Where the Bargaining Unit Consists of Only One Employee Is Inapplicable Here Since the Board Properly Found That the Unit Sought in This Case Consists of More Than One Employee**

Section 8(b)(7)(C) was designed to shield employers and employees from the adverse effects of prolonged recognition picketing and to provide a procedure whereby the underlying representation question may be resolved in a prompt and orderly fashion. To this end, the statute bars recognition picketing for more than a reasonable period of time not to exceed 30 days unless a representation petition is filed within that period. If a petition is filed, the Board conducts an expedited election in which employees can freely register their choice. If the vote is prounion, a certification will issue and Section 8(b)(7)'s restraints are inapplicable; if the employees reject the union, Section 8(b)(7)(A) bars recognition picketing for a period of 12 months. See generally, *Local 182, Teamsters, supra*, 314 F. 2d at 58; *Department & Specialty Store Employees, Local 1265 v. N.L.R.B.*, 284 F. 2d 619, 625-626 (C.A. 9); *N.L.R.B. v. Lawrence Typographical Union No. 570*, — F. 2d —, 65 LRRM 2176 (C.A. 10); *Dayton Typographical Union No. 57 v. N.L.R.B.*, 326 F. 2d 634 (C.A. D.C.).

The Board regards this statutory scheme as inapplicable where a one-man unit is involved, because the election and certification procedures are unavailable in such a case. Since the Board will not conduct elections or otherwise compel bargaining for a one-man unit (*Luckenbach Steamship Co.*, 2 NLRB 181; *Al &*



*Dick's Steak House, Inc.*, 129 NLRB 1207), a union claiming recognition is disabled from invoking election procedures through no fault of its own. Accordingly, the Board held in *Teamsters Local Union No. 115 (Vila-Barr Co.)*, 157 NLRB 588, 61 LRRM 1386, that:

. . . it would be inequitable and, we believe, not within the intention of Congress, to condition the lawfulness of the recognitional picketing in a one-man unit on the union's filing of a petition since, if such petition were filed, it would be dismissed.

In this case, the Trial Examiner recommended that the complaint be dismissed because he deemed the *Vila-Barr* case controlling: "I find that only one of the persons working at Pacheco's store, the truckdriver, was an employee within the meaning of the Act" (R. 17). The Board disagreed, concluding that there were at least two employees in the unit, i.e., the truckdriver and the production employee not related to Pacheco (R. 33). Accordingly, *Vila-Barr* was distinguishable and Section 8(b)(7)(C) applied here. We now show that the Board's determination is reasonable and proper.

First, there is no question about the truckdriver's "employee" status: this issue was determined adversely to respondent by the Trial Examiner and no relevant exceptions were taken (R. 33, n. 2). See Section 10(e) of the Act, which provides, in relevant part, that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court unless the failure or neg-

lect to urge such objection shall be excused because of extraordinary circumstances.” Second, and for similar reasons, no contention may be raised here that any of the three production workers were “supervisors” within the meaning of Section 2(11) of the Act and thereby excluded from employee status (R. 32). Third, the Board assumed, for purposes of this case, that the two production employees who were sons-in-law of Pacheco would be excluded from the bargaining unit, as a matter of policy, in part because of their familial relationship to the employer (R. 33, n. 3). See *International Metal Products Co.*, 107 NLRB 65, 67, excluding employer relatives who enjoy a special status, aligning them with management, because of their family relationship.<sup>7</sup> In light of these preliminary considerations, it is clear that respondent’s *Vila-Barr* defense rests solely upon the contention that the third production worker—unnamed in the record—is not entitled to the status of “employee” as defined in Section 2(3) of the Act. The Board properly rejected this contention.

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<sup>7</sup> But see *Browne and Buford*, 145 NLRB 765, 768, where an employee who was the son-in-law of the employer was included in the unit because there was no evidence that he enjoyed a “special status” by virtue of his familial relationship. As the cited cases illustrate, the Board may exercise its discretion under Section 9 to exclude certain individuals from a bargaining unit even though they have employee status. Under Section 2(3), only an “individual employed by his parent or spouse” is deprived of employee status. *Yoshio Uyeda v. Brooks*, 365 F. 2d 326, 328-330 (C.A. 6). Therefore, the statute itself does not require a son-in-law to be deprived of the benefits of the Act.



Section 2(3)<sup>8</sup> embodies a Congressional determination that the solutions to national labor problems provided in the Act should be made available in a very broad fashion. The term employee, Congress stated, includes “any employee” except for those individuals specifically exempted, i.e., agricultural and domestic workers, independent contractors and supervisors, and employees of exempt employers. Attempts to deprive other workers of the coverage of the Act stand on an unfirm footing when such workers “are subject, as an economic fact, to the evils the statute was designed to eradicate and . . . [when the Act’s] remedies . . . are appropriate for preventing them or curing their harmful effects in the special situation.” *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 127; *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 185-186, 191-192. For as the Supreme Court has explained, the term employee in Section 2(3):

. . . must be understood with reference to the purposes of the Act and the facts involved in the economic relationship. Where all the conditions of the relation require protection, protection ought to be given. [*Hearst Publications, supra*, 322 U.S. at 129.]

In 1947, Congress overruled the substantive holding of the *Hearst* decision by adding the specific exemption for independent contractors now present in the Act. See *Boire v. Greyhound Corp.*, 376 U.S. 473, 481. But there is no basis for reading the 1947

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<sup>8</sup> Its full text appears *infra*, p. 25.



amendment as a general legislative mandate to construe Section 2(3) narrowly, or to deprive employees like the one involved here of Section 2(3) status. House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 18; Volume I, Legislative History of the Labor Management Relations Act, 1947, p. 309 (hereinafter referred to "Leg. Hist. '47"). Conference Report No. 510 on H.R. 3020, 80th Cong., 1st Sess., pp. 32-33; I Leg. Hist. '47, pp. 536-537.

On the contrary, the Supreme Court's general approach to the interpretation of the term "employee" in *Hearst* remains in effect and federal court decisions after 1947 repeatedly illustrate that the Act still embodies a Congressional effort "to find a broad solution, one that would bring industrial peace by substituting, as far as its power could reach, the rights of workers to self-organization and collective bargaining for the industrial strife which prevails when these rights are not effectively established." (322 U.S. at 125).<sup>9</sup>

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<sup>9</sup> *Jas. E. Matthews & Co. v. N.L.R.B.*, 354 F. 2d 432, 435 (C.A. 8); *Local 28, IOMMP v. N.L.R.B.*, 321 F. 2d 376, 377 (C.A. D.C.); *N.L.R.B. v. Lee-Rowan Co.*, 316 F. 2d 209, 212 (C.A. 8), cert. denied, 375 U.S. 827; *N.L.R.B. v. Phoenix Mutual Life Ins. Co.*, 167 F. 2d 983, 985-987 (C.A. 7), cert. denied, 335 U.S. 845; *N.L.R.B. v. Nu-Car Carriers, Inc.*, 189 F. 2d 756 (C.A. 3), cert. denied, 342 U.S. 919; *Amalgamated Meat Cutters, etc. Local 88 v. N.L.R.B.*, 237 F. 2d 20, 23 (C.A. D.C.), cert. denied, 352 U.S. 1015; *N.L.R.B. v. A. S. Abell Co.*, 327 F. 2d 1, 3-4 (C.A. 4); *Minnesota Milk Co. v. N.L.R.B.*, 314 F. 2d 761, 764-765 (C.A. 8) and cf. *N.L.R.B. v. Monterey County Bldg. & Const. Trades Council*, 335 F. 2d 927, 930, n. 4 (C.A. 9).

Protection is obviously required here. Those who work for Pacheco, like any undisputed "employee", are subject to the very pressures generated by recognition picketing which led Congress to enact Section 8(b)(7). It would be difficult to imagine why Congress would have deprived the unnamed production worker in this case of the Act's protection against such picketing, or to suppose that, in this case, Congress was somehow more willing to permit a representation question to be resolved by picketing instead of by a free election. Indeed, respondent has not even suggested that any pragmatic reasons exist to support such disparate treatment. It is true, of course, that this individual enjoys a close working relationship with Pacheco; he is consulted on business decisions and he receives reimbursement for certain personal expenses in addition to his fixed weekly salary (*supra*, p. 3). But that is hardly a reason for supposing that Congress would not have extended the protections of the Act to him. Indeed, the unfair labor practice section of the Act itself demonstrates that Congress intended the benefits of the Act to extend equally to those who work for a paternalistic employer. See Section 8(a)(2); *IAM Lodge No. 35 v. N.L.R.B.*, 311 U.S. 72, 80; *N.L.R.B. v. Stow Mfg. Co.*, 217 F. 2d 900, 904 (C.A. 2), cert. denied, 348 U.S. 964; and cf. *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405; *ILGWU v. N.L.R.B.*, 339 F. 2d 116 (C.A. 2). In short, if the term employee is construed here—as it must be—in light of the remedial purposes to be served by the Act and the facts of the economic rela-



tionship involved, there is simply no basis for depriving the unnamed production worker of coverage.<sup>10</sup>

To be sure, the Trial Examiner found that this worker's relationship to Pacheco "did not meet the definition of an employer-employee relationship" (R. 17). But as the Board pointed out, his reasoning "does not give due consideration to the record as a whole and to all the factors which are relevant to the question of employee status" (R. 33).

The Trial Examiner failed, in the Board's view, to give appropriate weight to the following evidence indicating employee status: the employer himself considers this worker one of his "employees" (Tr. 54), pays him a weekly salary in a fixed amount in exchange for labor provided, makes Social Security deductions and provides Workmen's Compensation coverage, and reimburses him by check for medical and certain other expenses (*supra*, pp. 2-3).

Further, the Examiner plainly allotted too much significance to the fact that these reimbursements were made from the profit of the business, since—as the Examiner himself acknowledged—"a profit-sharing plan may of course include employees" (R. 17).<sup>11</sup>

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<sup>10</sup> The fact that Pacheco was the godfather of this employee's children is not material. The restriction of the statute is inapplicable because it only requires exemption for an "individual employed by his parent or spouse." And the Board has never, in the course of fashioning unit exclusions based upon special family relationship, excluded any individual because of the "distant and indirect" (R. 33, n. 3) kind of relationship involved here.

<sup>11</sup> Moreover, as the Board pointed out (R. 33), there would be no evidentiary basis here for a finding that the production



Finally, the Examiner deemed it significant that the production worker “had authority effectively to make recommendations which were more than routine and clerical” (R. 17) with respect to management decisions including such matters as the hiring of employees and the purchasing of supplies. But as the Board pointed out, there is no evidence to support a finding that this worker exercised any independent judgment on these matters (R. 33). The record simply shows that Pacheco, who retained power to make the ultimate decisions (Tr. 54), “discussed the business” with his employees and elicited suggestions from them (Tr. 53). There is nothing in the record to suggest that any worker on Pacheco’s payroll ever made an independent decision to hire or fire anyone, or to change suppliers or operating procedures. But it would surely be an unusual small business operation if the employer failed to consult, as Pacheco did, with those who were doing the work for him.

Finally, the Examiner tacitly acknowledged that no one of the factors he had relied upon would support a finding of exemption from the Act’s coverage, but concluded that all of them combined created a unique arrangement outside the reach of the statute.

The arrangement has some of the aspects of a communal compound, some of *de facto* partner-

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worker’s expenses were paid for through a profit-sharing arrangement, since the record clearly shows that the reimbursements involved were made at the employer’s discretion, and not based upon any contractual right of the recipient (*supra*, p. 3).

ship. However described it did not meet the definition of an employer-employee relationship contemplated by the Act. [R. 17.]

But as we have already seen, some of these “aspects” represented factual findings unsupported by the record; others were simply features commonly found in many employment relationships. The Board, therefore, could properly reject this overall view, especially since the Examiner had ignored or given inadequate significance to the existing, traditional, indicators of an employment relationship in this record. Furthermore, the fact that the employment relationship involved here may be unique or unusual is hardly a reason to deny it the coverage of the Act. Indeed, one of the major reasons leading to the Board’s creation was the judgment of Congress that a completely definitive catalogue of the situations covered by the Act could not be enacted but would have to await administration of the Act by an expert and experienced agency. *Hearst, supra*, 322 U.S. at 128-130; *Phelps Dodge, supra*, 313 U.S. at 191-194. It is therefore a traditional and essential task of the Board to determine whether the broad statutory terms cover a particular unique situation; the Board would hardly be fulfilling its mandate if it stayed its processes simply because the situation before it was characterized by atypical features.

Moreover, and even if the Board’s substantive analysis and conclusion were less persuasive, procedural considerations relating to the burden of proof and scope of judicial review would amply justify an en-



forcement decree here. Thus, as this Court has recently pointed out, the Act:

. . . was designed to include all employees not specifically excepted . . . [and] the party claiming an exemption has the burden of proving that it comes within the exemption." [*N.L.R.B. v. Monterey County Bldg. & Const. Trades Council*, 335 F. 2d 927, 930, n. 4.]

Yet respondent here, the party claiming the exemption, did not call any witnesses to support its contention but relied solely upon the technique of posing leading questions during cross-examination of the General Counsel's witnesses. The Board was surely entitled to discount the probative weight of affirmative answers to such questions as this, for example:

So the decisions of the business are made as a sort of counseling within the family circle? [Tr. 50.]

The existence of a "family circle," or, to put it in the terms used by the Examiner, "a communal compound," was obviously a matter to be proved by detailed explication of all the circumstances; no witness was capable of resolving that question by a simple "yes" or "no" answer. At the least, therefore, respondent is not entitled to the exemption because it has hardly sought to meet its evidentiary burden.

In any event, the applicable principles of judicial review strongly militate against upsetting the Board's decision on this kind of issue:

. . . it is elementary that the Board has the duty of determining in the first instance who is an



employee for purposes of the National Labor Relations Act and that the Board's determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law. [*N.L.R.B. v. E. C. Atkins & Co.*, 331 U.S. 398, 403.]

Or, as the Supreme Court stated in *Hearst, supra*, 322 U.S. 111:

. . . where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited . . . the Board's determination that specified persons are "employees" under the Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.<sup>12</sup>

Accordingly, whether or not the Court would have decided this issue—i.e., whether the production work-

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<sup>12</sup> The 1947 Taft-Hartley amendment, designed to exclude independent contractors from the coverage of the term "employee", did not alter that aspect of the *Hearst* case which articulated the applicable standard of judicial review. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487-488; *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 49-50; *N.L.R.B. v. Coca-Cola Bottling Co.*, 350 U.S. 264, 269; *N.L.R.B. v. Kohler Co.*, 351 F. 2d 798, 802 (C.A. D.C.); and see also, discussing the same standard of review in connection with the interpretation of other broad statutory terms, *Trans-Pacific Freight Corp. of Japan v. Federal Maritime Comm.*, 314 F. 2d 928, 935 (C.A. 9) ("employed by"); *Local 182, Teamsters, supra*, 314 F. 2d 53, 58 ("picketing"); *N.L.R.B. v. Randolph Elec. Membership Corp.*, 343 F. 2d 60, 62 (C.A. 4) ("political subdivision"); *Miami Newspaper Pressmen's Local No. 46 v. N.L.R.B.*, 322 F. 2d 405, 409 (C.A. D.C.) ("allied employer").

er was an “employee”—as the Board did had the issue been before the Court *de novo*, the Board’s decision is entitled to be accepted under the limited scope of review.<sup>13</sup>

### III. Respondent’s Reliance Upon the Supreme Court’s *Tree Fruits* Decision Is Misplaced

Before the Board, respondent argued that its picketing could not be prohibited because of the policy of immunity for certain “consumer picketing” articulated by the Supreme Court in *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits Labor Relations Committee, Inc.)*, 377 U.S. 58. But respondent’s reliance upon *Tree Fruits* is, as the Board held (R. 34, n. 4), clearly misplaced.

The issue in *Tree Fruits* arose under a different subsection of the Act, where different considerations applied. There, the union involved picketed at a retail food market in order to persuade the customers of the market not to buy a particular product on sale. The union had no independent labor dispute with the re-

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<sup>13</sup> The disagreement between the Board and the Examiner plainly had nothing to do with witness credibility or testimonial conflicts. As we have already shown, pp. 16-18, the Board generally disagreed with the Examiner’s legal analysis and his implicit policy views; in addition, the Board on occasion took a different view of the inferences properly to be drawn from the record. It follows, therefore, that the disagreement between the Board and the Examiner does not materially detract from the support for the Board’s determination. Compare *Universal Camera Co. v. N.L.R.B.*, 340 U.S. 474, 495, and *N.L.R.B. v. Pyne Molding Corp.*, 226 F. 2d 818, 819 (C.A. 2) with *Pittsburgh-Des Moines Steel Co. v. N.L.R.B.*, 284 F. 2d 74, 87 (C.A. 9).



tailer, but was on strike against a producer of the product. The question posed was whether Section 8(b) (4) (B)'s prohibition against secondary boycotts was violated by such picketing and the Supreme Court held that that Section of the Act was not violated where the union limited its picketing of the retail store "to an appeal to the customers of the stores not to buy the products of certain firms against which [the union] . . . was on strike." In other words, picketing—even at a neutral employer's premises—aimed solely at persuading retail customers not to buy a particular product was deemed outside the scope of Section 8(b) (4) (B)'s prohibition.<sup>14</sup>

But this case involves Section 8(b) (7), which aims at a different problem. Section 8(b) (4) (B) was designed to confine the pressures of a labor dispute to its immediate disputants, and to insulate neutral employers and employees against certain forms of union conduct—including picketing—designed to conscript them into a boycott of the union's real adversary.

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<sup>14</sup> See *N.L.R.B. v. Millmen & Cabinet Workers Union, Local No. 550*, 367 F. 2d 953, 955-956 (C.A. 9); *N.L.R.B. v. Local 254, Bldg. Service Employees*, 359 F. 2d 289, 292 (C.A. 1); *N.L.R.B. v. Bldg. Service Employees Int'l Union, Local No. 105*, 367 F. 2d 227 (C.A. 10) for cases interpreting and applying the *Tree Fruits* doctrine. As these cases show, a "mere facade" of consumer picketing (*Millmen, supra*, 367 F. 2d at 955) cannot preclude the Board from finding a Section 8(b) (4) (B) violation: the union must make it clear that its conduct at the secondary employer's premises is strictly limited to discouraging purchases of the objectionable product and does not amount to a "veiled coercion" (*Millmen, supra*, 367 F. 2d at 956) of the secondary employer.



*N.L.R.B. v. Denver Building Trades Council*, 341 U.S. 675, 692; *Local 761, Int'l Union of Electrical Workers v. N.L.R.B.*, 366 U.S. 667, 671-674; *Tree Fruits*, *supra*, 377 U.S. at 63-64. Section 8(b) (7), however, constitutes a direct regulation of “picketing”—even where it is confined to the primary employer—“where an object thereof is [recognitional or organizational].” We have already shown, *supra*, pp. 6-9, that the Board could properly find a recognition object in respondent’s picketing. It follows that the *Tree Fruits* doctrine of immunity is plainly inapplicable. Thus, we need not determine here if the Union’s picketing sufficiently conforms to *Tree Fruits* standards so as to constitute primary action. Since no Section 8(b) (4) (B) charge is involved here, we may assume that the Union’s conduct was primary. The only real question is whether an object of its picketing was to compel recognition.<sup>15</sup> *Lawrence Typographical Union*, *supra*, 65 LRRM at 2183; cases cited *supra*, p. 22, n. 14.

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<sup>15</sup> That the Union may have *also* sought to discourage retail purchases from the Company is, if true, immaterial. One unlawful object warrants Section 8(b) (7)’s application. See cases cited *supra*, p. 8, n. 5.

## CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.<sup>16</sup>

ARNOLD ORDMAN,  
*General Counsel,*

DOMINICK L. MANOLI,  
*Associate General Counsel,*

MARCEL MALLET-PREVOST,  
*Assistant General Counsel,*

GARY GREEN,  
*Attorney,*  
*National Labor Relations Board.*

June 1967.

## CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST  
*Assistant General Counsel*  
*National Labor Relations Board*

---

<sup>16</sup> In its brief to the Trial Examiner, respondent argued that the representation petition filed by the Company on November 8 constituted a timely petition within the meaning of Section 8(b) (7) (C). But it was stipulated at the hearing that picketing began on October 1 or 4 (Tr. 6). Obviously, therefore, and quite apart from the problems raised by the Company's subsequent withdrawal of the petition and the Union's consent thereto (see *Dayton Typographical, supra*, 326 F. 2d at 645-646), it is clear that no petition was filed "within a reasonable period of time not to exceed thirty days from the commencement of the picketing."

## APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

## SEC. 2. When used in this Act—

\* \* \* \*

(3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer herein defined.

\* \* \* \*

SEC. 8 (b) It shall be an unfair labor practice for a labor organization or its agents . . .

\* \* \* \*

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain



with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9 (c) of this Act, (B) where within the preceding twelve months a valid election under section 9 (c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9 (c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9 (c) (1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this para-

graph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8 (b).

\* \* \* \*

## SEC. 10 . . .

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code, Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that

there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.



## APPENDIX B

## INDEX TO REPORTER'S TRANSCRIPT

## Board Case No. 20-CP-183

## General Counsel's Exhibits

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>
1-A through 1-F	4	4	4
2	40	40	40
3	42	43	44

## Respondent's Exhibits

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>
1, 2	8	8	8
3	10	9	10

## WITNESSES FOR THE GENERAL COUNSEL

	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Brenda Correia	14	24	31	
Joan Pacheco	32	44	52	54



No. 21,742

IN THE

United States Court of Appeals  
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

VS.

BUTCHER'S UNION LOCAL NO. 120, AMAL-  
GAMATED MEAT CUTTERS AND BUTCHER  
WORKMEN OF NORTH AMERICA,  
AFL-CIO,

*Respondent.*

On Petition for Enforcement of an Order of the  
National Labor Relations Board

BRIEF OF RESPONDENT UNION

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FILED

SEP 16 1967

SEP 8 1967

WM. B. LUCK, CLERK





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No. 21,742

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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NATIONAL LABOR RELATIONS BOARD,	}
<i>Petitioner,</i>	
VS.	
BUTCHER'S UNION LOCAL No. 120, AMAL- GAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,	
<i>Respondent.</i>	}

---

**On Petition for Enforcement of an Order of the  
National Labor Relations Board**

**BRIEF OF RESPONDENT UNION**

---

**PRELIMINARY STATEMENT**

This case represents extremely simple questions to be determined by this Court. The General Counsel for the National Labor Relations Board has cited in his brief a myriad of cases but refuses to deal with the basic issues.

We will attempt to treat this matter briefly, as we have throughout these proceedings, on the following

issues as found by the Trial Examiner of the National Labor Relations Board:

“1. Whether the object of the picketing was informational or recognitory;

“2. Whether the petition filed in 20-RM-803 can serve as a defense; and

“3. Whether an appropriate unit existed at Pacheco which would support a petition filed under Section 9(C) of the Act<sup>1</sup> or a direction of election under Section 8(b)(7)(C).”

All issues were fully briefed by the undersigned in the brief to the Trial Examiner which is part of the record in this matter. The Trial Examiner felt, however, that the first two items need not be decided, and with respect to item 3 the filing of a petition by respondent Union would have been a nullity inasmuch as a one-man unit is not an appropriate unit under the standards established by the National Labor Relations Board. These questions will be dealt with below.

---

**NO DEMAND FOR RECOGNITION OR REPRESENTATION  
WAS EVER MADE BY THE UNION.**

The legal position of the Union in this matter at all times has been that there has never been a demand for recognition and there has never been a request to represent the employees of the affected employer

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<sup>1</sup>The reference here and subsequently in this brief to “the Act” is to the Labor Management Relations Act of 1947, as amended.

within the time periods which are material to this action. Under those circumstances the Union has a right to engage in standards of picketing and to advise the public of its dispute with the employer which arises by virtue of the fact that the employer is paying substandard conditions to its employees. (*NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 790*, 377 US 58 (April 20, 1964); *NLRB v. Servette, Inc.*, 377 US 46 (April 20, 1964).)

It has also been held that informational picketing without an immediate recognition of all objectives will not support an employer's petition for an election where the Union disclaims interest in representing the employees involved, as is the case in the instant matter. (*Martino's Complete Home Furnishings*, 145 NLRB No. 66 (1963); *Cockatoo, Inc.*, 145 NLRB No. 167 (1963).)

It is therefore clear that either under the theory of so-called informational (standards) picketing or consumer picketing, the conduct of the respondent in this matter is lawful and that a disclaimer serves to prevent processing of an unfair labor practice charge against it under the theory proposed by the General Counsel, even if it were conceded for purposes of argument, that a demand had in fact been made for recognition.

The entire position of the General Counsel and the National Labor Relations Board is that the picketing here was without the filing of a petition pursuant to the provisions of Section 9(c) of the Act and was therefore unlawful conduct pursuant to the provisions



of Section 10(1) of the Act. In fact, however, a petition for representation was filed pursuant to the provisions of Section 9(c) in Case No. 20-RM-803, and was attached to the petition for injunction filed in the United States District Court for the Northern District of California in Case No. 44496. Therefore the position of the General Counsel has been inconsistent throughout these proceedings.

It is further clear that the picketing in this case was lawful since the record conclusively establishes that there was no interference with the company's employees, its operations, or deliveries. (See *Claude Everett Construction Co.*, 136 NLRB 321; *Calument Contractors Association*, 133 NLRB 512.)

---

**THE FILING OF A PETITION BY RESPONDENT IN THIS  
MATTER WOULD HAVE BEEN A NULLITY.**

In this regard it should be noted that respondent cannot be required to file a petition where the filing of such a petition would be a nullity. The National Labor Relations Board will not entertain a petition for representation election where the unit consists of a single employee. In this case the so-called employee unit includes, according to the affidavit of Pacheco, three production employees, two of whom are the sons-in-law of the owners, and their two part-time employees, both of whom are the daughters of the employer, who states this is a "family-operated business".

The Act specifically exempts a parent or spouse from the definition of "employee" and the Board treats all relatives of management who enjoy a special status which allies their interest with those of management as exempt employees. (*Teamsters Local Union No. 115*, 157 NLRB 588 (No. 57, Villa-Barr Co.), 61 LRRM 1386; see, also, *International Metal Products Co.*, 107 NLRB 65 (1953).)

It should be noted further that the Trial Examiner agreed with the position of respondent Union in this case and on that basis held that no unfair labor practice was committed.

It is respondent's contention that the Board in reaching its conclusion did not even deal with the issues handled by the Trial Examiner and on that ground it is respectfully submitted that the petition for enforcement should be denied.

Dated, San Francisco, California,  
September 7, 1967.

LEVY, DERoy, GEFNER & VAN BOURG,  
By VICTOR J. VAN BOURG,

*Attorneys for Respondent*

*Butcher's Union Local No. 120,  
Amalgamated Meat Cutters and  
Butcher Workmen of North  
America, AFL-CIO.*

## CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

VICTOR J. VAN BOURG,

*Attorney for Respondent*

*Butcher's Union Local No. 120,  
Amalamated Meat Cutters and  
Butcher Workmen of North  
America, AFL-CIO.*



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In the United States Court of Appeals  
for the Ninth Circuit

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION No. 38, UNITED ASSOCIATION OF JOUR-  
NEYMEN AND APPRENTICES OF THE PLUMBING AND  
PIPE FITTING INDUSTRY OF THE UNITED STATES  
AND CANADA, AFL-CIO, RESPONDENT

---

On Petition for Enforcement of an Order of the  
National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD

---

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WM. D. LUCK, CLERK

FILED

JUN 15 1967

JUN 21 1967



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**In the United States Court of Appeals  
for the Ninth Circuit**

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No. 21,743

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

LOCAL UNION No. 38, UNITED ASSOCIATION OF JOUR-  
NEYMEN AND APPRENTICES OF THE PLUMBING AND  
PIPE FITTING INDUSTRY OF THE UNITED STATES  
AND CANADA, AFL-CIO, RESPONDENT

---

**On Petition for Enforcement of an Order of the  
National Labor Relations Board**

---

**BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD**

---

**JURISDICTION**

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order issued against the respondent on June 15, 1966, pursuant to Section 10(c) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29

U.S.C. Sec. 151, *et seq.*).<sup>1</sup> The Board's decision and order (R. 13-28)<sup>2</sup> are reported at 159 NLRB No. 36. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in San Francisco, California.

## STATEMENT OF THE CASE

### I. The Board's Findings of Fact

Briefly, the Board found that Local 38 (hereafter the Union) caused D. I. Chadbourne (hereafter the Company) to discharge Phillip Havill because of his non-membership in the Union in violation of Section 8(b)(2) and (1)(A) of the Act. The facts upon which the Board's findings rest are set forth below.

The Union and the Company were parties to a collective bargaining agreement in effect at all times material here (G.C. Exh. 7). Article II, Section 2 thereof required the Company to fulfill its need for qualified plumbers and pipefitters by calling the Union. However, the agreement also provided (Art. II. Section 7) that "If, but only if, the Union is unable to furnish qualified workmen within 48 hours after an employer calls for them, the employer shall be free to

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<sup>1</sup> The pertinent statutory provisions are reprinted, *infra*, pp. 13-15.

<sup>2</sup> References to the pleadings reproduced as "Volume I, Pleadings" are designated "R." References to the stenographic transcript of the hearing reproduced pursuant to Court Rule 10 are designated "Tr." References to the General Counsel's exhibits are designated "G.C. Exh." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.



procure the workmen from any other source or sources . . . .”

In July of 1964<sup>3</sup> Daniel Chadbourne, Company president, called Robert Costello, Union business representative and dispatcher at the hiring hall, requesting a “jobbing plumber and steamfitter that knows something about hot water and steam boilers” (R. 14; Tr. 26-27, 366-368). Thereafter on July 27, the Union dispatched William Guse. Although Guse proved unable to perform the type of work specified, he was kept on in another capacity (R. 14; Tr. 28). Subsequently Chadbourne renewed his request and the Union dispatched Harold Stone (R. 14; Tr. 28-29). Stone also proved to be unqualified (R. 14; Tr. 30-31). At this time, Chadbourne learned that one of his own employees, Phillip Havill, had extensive prior experience with boilers<sup>4</sup> (R. 14-15; Tr. 34, 36). Accordingly, the job was offered to Havill and accepted (R. 15; Tr. 109).

On August 31, acting on instructions from Chadbourne, Havill went to the hiring hall to register with the Union as required by the Agreement (R. 15; Tr. 110; G.C. Exh. 7, p. 11). Havill was not a member of the Union, nor was he registered on its out-of-work list (R. 15; Tr. 49). His initial efforts to register were unsuccessful as the dispatch office was

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<sup>3</sup> All dates hereafter are 1964 unless otherwise stated.

<sup>4</sup> Havill had been employed at non-unit work for the Company since 1963 (R. 15, n. 4; Tr. 33). Prior to his employment with the Company, he had held a variety of jobs involving boilers (Tr. 101-106).

closed. On the following day, Havill telephoned Costello to inform him that he had been hired by the Company and wanted to register (R. 15; Tr. 111). Costello inquired as to where he had worked before. Havill started to reply but Costello interrupted, asking "which locals did you work out of?" (R. 15, 20; Tr. 111). Havill replied that he had worked out of "different locals," but Costello again interrupted to ask "what plumbing and pipefitting locals?" Havill admitted, "None" (*Id.*). Costello responded, "you are not going to work. \* \* \* You are not qualified and you haven't served an apprenticeship" (R. 15; Tr. 111). Havill was then directed to inform Chadbourne that if the latter wanted men the Union had "men sitting on the bench" (R. 15-16; Tr. 112). Havill responded that he was going to work the next day; Costello replied, "You are like Hell" (R. 16; Tr. 112).

Upon the conclusion of his talk with Havill, Costello called Chadbourne to complain about the latter's intention to hire Havill. Costello characterized Havill as a "non-union man" and threatened to "put a picket line down in front of your shop" (R. 16; Tr. 38). Chadbourne noted that the Union had been unable to furnish a qualified boiler man (Tr. 38-39). After hanging up, Chadbourne decided to use the hiring hall again as he couldn't "afford any trouble" (R. 16; Tr. 112).

Thereafter, two more applicants were dispatched by the Union to be interviewed for the job (R. 16; Tr. 32-33, 95-96). The first, Jack Baker, admitted that he had not worked on boilers for 20 years and wanted to learn that phase of the trade; the second applicant,



R. W. Unger, conceded he had no experience in servicing boilers (R. 16; Tr. 33, 62, 64-65). Neither man was hired. This was, in Chadbourne's words, "the straw that broke the camel's back," and on September 3 he told Havill to start work the next day (R. 16; Tr. 64-65).

On September 3, Chadbourne wrote the Union, pointing out that the Union had failed to provide a qualified boiler man and informing the Union that Chadbourne had hired Phillip Havill in accordance with Article II, Section 7 of the Agreement (R. 16-17; G.C. Exh. 2). The Union replied by letter, serving notice on Chadbourne that he had "violated our Agreement," and asking that he immediately correct this situation and get rid of all non-Union men in your employ" (R. 17; G.C. Exh. 3). A meeting ensued on September 29 between Chadbourne, Costello, and Mazzola, the Union's business manager. At that time, Mazzola repeated his demand that Havill be fired, insisting that the hiring was in violation of the Agreement and further expressing his opposition to Havill because the latter was "non-union" and the employment of "non-union help" would encourage other employees to follow Chadbourne's example (R. 17-18; Tr. 44-48). Mazzola also protested that "they had 50 men sitting on the bench and that he had plenty of experienced men to do the job" (R. 18; Tr. 44-45). Chadbourne repeated his statement that he had been unable to secure qualified workmen from the Union and maintained that the hiring of Havill was proper under Article II, Section 7 of the Agreement



(R. 18; Tr. 45). A second meeting followed a week later at which various alternatives were discussed without success (R. 18-19; Tr. 49-50). The parties remained adamant.

On October 22, the Union, in a letter drafted by its attorney, repeated its demand that Chadbourne discharge Havill (R. 19; Tr. 393; G.C. Exh. 5). A few days later, Chadbourne complied. He also wrote the Union that he had discharged Havill in compliance with the Union's demands but maintained that he had not violated the hiring procedure of the Agreement and was acting in order to avoid trouble (R. 19-20; G.C. Exh. 6). Thereafter Havill filed the instant charge with the Board's Regional Office alleging that the Union had unlawfully caused his discharge.

## II. The Board's Conclusions and Order

On these facts, the Board, in agreement with the Trial Examiner, found that the Union had violated Section 8(b)(2) and (1)(A) of the Act by causing the Company to discharge Phillip Havill because of his non-membership in the Union (R. 22).

The Board's Order (R. 25-27) requires the Union to cease and desist from causing or attempting to cause the Company to discriminate against Phillip Havill or other employees in violation of Section 8(a)(3) of the Act by causing or attempting to cause the Company to discharge them because of their non-membership in the Union, or in any like or related manner restraining or coercing employees of the Company in the exercise of their Section 7 rights. Af-

firmatively, the Union is required to make Havill whole for any loss of pay suffered by reason of the discrimination and to notify the Company and Phillip Havill that it has no objections to Havill's employment and request that the Company offer him reinstatement to his former or a substantially equivalent position. Finally, the Union is required to post the customary notice.

### ARGUMENT

**Substantial Evidence on the Record Considered as a Whole Supports the Board's Finding That the Union Caused the Discharge of Employee Phillip Havill Because He Was Not a Union Member, in Violation of Section 8(b)(2) and (1)(A) of the Act**

Section 8(b)(2) of the Act forbids a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8](a)(3) . . . ." In the instant case, it is undisputed that the Union caused the discharge of Phillip Havill. Accordingly, if the Union was motivated in its conduct by Havill's lack of union membership, a clear statutory violation is established. *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 40-42; *N.L.R.B. v. Local 776, IATSE (Film Editors)*, 303 F. 2d 513 (C.A. 9), cert. denied, 371 U.S. 826; *Pacific Plywood Co. v. N.L.R.B.*, 315 F. 2d 671, (C.A. 9) enf'g *per curiam*, 134 NLRB 736; *N.L.R.B. v. (Local 369), IBEW*, 341 F. 2d 470 (C.A. 6); *Local Union No. 742, United Brotherhood of Carpenters and Joiners v. N.L.R.B.*, 64 LRRM 2598 (C.A. D.C.), decided March 16, 1967.

The Board found that the "real reason" for the Union's conduct was Havill's lack of union membership.



In so finding, the Board rejected the Union's contention that it sought the discharge of Havill solely because he had been hired in violation of the collective bargaining agreement. The question now before this Court is whether substantial evidence supports the Board's conclusion. It is thus immaterial that the Court might have decided differently if the case had been before it *de novo*. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488; *N.L.R.B. v. U.S. Divers Company*, 308 F. 2d 899, 905 (C.A. 9). We submit that the Board, as we now show, was amply justified in holding that the Union was motivated to seek Havill's discharge by [his] lack of union membership and not by any breach of the Agreement.

Thus, as set forth in the Statement, p. 4, when Havill called the Union to register, as required by the collective bargaining agreement, Costello asked him what "locals," i.e. what "plumbing and pipefitting locals" he had worked out of. Havill answered, "None." Costello then asserted in no uncertain terms, "you are not going to work, you are not qualified and you haven't served an apprenticeship" <sup>5</sup> (R. 15; Tr. 111). Costello also told Havill to inform the Company that the Union had "men sitting on the bench" (R. 15-16; Tr. 112). When Costello called

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<sup>5</sup> It is clear that the Union was not interested in Havill's "ability" to do the job. Thus, when Havill attempted to relate his past employment record, he was interrupted and questioned as to what locals he had worked out of (R. 15; Tr. 111). Furthermore, at the hearing, the Union maintained that Havill's "qualifications to perform the work in dispute are not at issue here" (Tr. 102). In any event the record is clear that Havill was qualified (Tr. 102-105).



Chadbourne he characterized Havill as a “non-union man,” and threatened to picket if he were not fired.<sup>6</sup>

Then, in answering Chadbourne’s letter explaining why he rehired Havill, respondent demanded that Chabourne “get rid of all non-Union men in your employ.” And when Chadbourne met with Mazzola and Costello, they objected to Havill because he was “non-union” and the employment of non-union help would encourage other employees “to do what Chadbourne did”<sup>7</sup> (R. 17-18; Tr. 44-48).

The Union contended before the Board that it sought the discharge of Havill solely because the Company hired him in violation of the collective bargaining agreement. This contention, as the Trial Examiner found (R. 20) is at odds with the express terms of the Agreement, wherein the parties clearly recognize the right of an employer to hire personnel without going through the hiring hall in certain circumstances. Thus, Article II, Section 7 specifically provides that “if the Union is unable to furnish qualified

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<sup>6</sup> Costello denied in part Havill’s version of this conversation but was not credited by the Trial Examiner (R. 16, n. 9). It is settled law that credibility resolutions are matters for determination by the trier of fact which, if reasonable, will not be disturbed upon review. *N.L.R.B. v. Local 776, IATSE (Film Editors)*, 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F. 2d 466, 469, (C.A. 9), and cases cited n. 10 thereat.

<sup>7</sup> Mazzola denied making any reference to Havill’s “non-union” status (R. 18, n. 12). But, as the Examiner pointed out, this was the same phrase Mazzola used in his letter of September 22 (G.C. Exh. 3). In any event the Examiner credited Chadbourne (R. 18, n. 12). See cases cited, *supra*, n. 6, p. 9.

workmen within 48 hours after an employer calls for them, the employer shall be free to procure the workmen from any other source or sources”<sup>8</sup> (G.C. Exh. 7, p. 11). It is undisputed that over a period of several weeks the Company sought and the Union was unable to furnish a qualified applicant for the job. *Supra*, p. 3-5. Indeed, the Union objected to Chadbourne’s hiring Havill even after it had dispatched two men upon Chadbourne’s request, one of whom had not worked on boilers for 20 years and wanted to learn about them, and the other utterly inexperienced in servicing boilers. The contract apparently provides that an employer may hire outside the hiring hall in these circumstances. If respondent thought otherwise, it could have submitted its claim to the Joint Hiring Committee established by the Agreement for the express purpose of hearing “disputes or grievances arising out of the operation of the job referral system . . . .” (G.C. Exh. 7, p. 12). Indeed, the failure of the Union to do that strengthens the Board’s conclusion—drawn from other evidence—that respondent was illegally motivated in causing Havill’s discharge. See, *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F. 2d 466, 469 (C.A. 9); *N.L.R.B. v. Dant*, 207 F. 2d 165, 167 (C.A. 9); *N.L.R.B. v. Griggs Equip., Inc.*, 307 F. 2d 275, 278 (C.A. 5).

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<sup>8</sup> Specifically, the Union argued that the above provision should be construed to permit the Union to refer all men it deemed qualified for the job without regard to the length of time this would require the employer to wait before he could turn to “other sources.” The interpretation thus suggested would render the 48-hour provision virtually meaningless.



And even if one reason for the Union's insistence that Chadbourne be fired was its belief that the Company had violated the contract, the record makes plain that another reason was Havill's non-membership. Since one reason respondent sought Havill's discharge was unlawful, the Board could find a violation even if respondent had other, legitimate grounds for its action. *N.L.R.B. v. Tonkin Corp.*, 352 F. 2d 509 (C.A. 9); *N.L.R.B. v. Whittin Machine Works*, 204 F. 2d 883, 885 (C.A. 1); *N.L.R.B. v. West Side Carpet Cleaning Co.*, 329 F. 2d 758, 761 (C.A. 6), *Cf. N.L.R.B. v. Security Plating Co., Inc.*, 356 F. 2d 725, 728 (C.A. 9); *N.L.R.B. v. Texas Independent Oil Co.*, 232 F. 2d 447, 450 (C.A. 9).

In sum, we submit that the evidence amply supports the Board's finding that the Union violated Section 8(b)(2) and (1)(A) of the Act by causing the discharge of Havill because of his nonmembership in the Union.



## CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

ARNOLD ORDMAN,  
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DOMINICK L. MANOLI,  
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MARCEL MALLET-PREVOST,  
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JOHN I. TAYLOR,  
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*National Labor Relations Board.*

June 1967.

## CERTIFICATE

The undersigned certifies that he had examined the provisions of Rules 18, 19 and 39 of this Court, and in his opinion the tendered brief conforms to all requirements.

---

MARCEL MALLET-PREVOST  
*Assistant General Counsel*  
*National Labor Relations Board*

## APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

## RIGHTS OF EMPLOYEES

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. \* \* \*.

## UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

\* \* \* \*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization \* \* \*.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; \* \* \*

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against

an employee with respect to whom membership, in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

\* \* \* \*

### PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(c) \* \* \* If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: \* \* \*

\* \* \* \*

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have the power to grant such temporary relief or restraining order as it deems just and proper,



and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

## APPENDIX B

Pursuant to Rule 18 (2) (f) of the Rules of the Court

Exhibits in Board Case No. 20-CB-1297 (page references are to the numbered pages of the transcript).

## GENERAL COUNSEL'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>
1 (a) -1 (p)	7	7	7
2-6	12	13	13
7	15	15	15
8	21	22	22
9	22	(not offered)	
10	142	142	143
11	143	143	144
12	145	149	150
13 (a-b)	233	233	233
14	237	237	237
15 (a-b)	240	241	242
16	240	241	242
17	274	274	274
18 (a-b)	279	279	280
19	287	287	288
20	290	291	291
21	296	296	297
22	308	308	308
23	399	399	401
24	387	387	387

## RESPONDENT'S EXHIBITS

1	82	83	83
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No. 21,743

In the  
United States Court of Appeals  
*For the Ninth Circuit*

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NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*  
vs.

LOCAL UNION No. 38, UNITED ASSOCIATION  
OF JOURNEYMEN AND APPRENTICES OF  
THE PLUMBING AND PIPE FITTING INDUS-  
TRY OF THE UNITED STATES AND CANADA,  
AFL-CIO,  
*Respondent.*

---

**Brief for Respondent**

On Petition for Enforcement of an Order of the  
National Labor Relations Board

---

**FILED**

AUG 14 1967

WM. B. LUCK, CLERK

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AUG 17 1967





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AFL-CIO,

*Respondent.*

---

**Brief for Respondent**

On Petition for Enforcement of an Order of the  
National Labor Relations Board

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**STATEMENT OF THE CASE**

The Statement of the case contained in the Board's Brief, accurate enough as far as it goes, requires supplementation for an understanding of Respondent's position.

The Board made certain Findings of Fact to the effect that initial communications between the Union and both Havill and Chadbourne made reference to the fact that Havill was not a union member. While Respondent does not agree with all those Findings, it concedes that they are supported by substantial evidence within the meaning of applicable criteria limiting the scope of judicial review.

Even on the basis of the Findings, however, it is clear that the Union's references to Havill's non-membership status were limited to the period of time prior to the second meeting between Union representatives and Chadbourne. No mention of Havill being "non-union" was made after the first meeting. At the second meeting, all discussion centered around the Union's contention that Havill had been hired in violation of the hiring hall provisions of the collective bargaining agreement (Vol. I Tr., p. 18, l. 26 - p. 19, l. 26). Mazzola proposed that Havill be sent down to register on the out-of-work list, but Chadbourne refused (Vol. I Tr., p. 7, lines 1-7). Mazzola then proposed that the issue between the parties with respect to the Union's contention be submitted to the Joint Hiring Committee provided for in the collective bargaining agreement, and again Chadbourne refused. (Id. lines 8-12). At the hearing, Chadbourne stated his reason for refusing to follow the contractual procedure as follows:

"I wasn't interested in having any meeting. The only thing I was interested in at that time was not to have any problems. I wanted to just work out a solution some way because I knew that any type of meeting that would be had, I would not have much of a chance of getting a point over."

Prior to the second meeting, Chadbourne had discussed with his attorney questions relating to the legality of the Union's hiring hall (Vol. I Tr. p. 18, lines 19-24); and during the second meeting both Chadbourne and Mazzola discussed such questions by telephone with the attorney for the Union (Vol. I Tr. p. 19, lines 14-26). Finally, after the second meeting, Mazzola sent Chadbourne a letter requesting that Havill be dismissed from employment for the reason that he was hired contrary to the provisions of the agreement (Vol. I Tr. p. 19, lines 31-37).

## ARGUMENT

### **The Board Erred in Concluding That the Union Caused the Discharge of Employee Phillip Havill Because He Was Not a Union Member, in Violation of Section 8(b)(2) and (1)(A) of the Act.**

Concededly there is sufficient evidence in the record to sustain a finding that initially the Union was unhappy because Havill was not a member; but the Board's conclusion that such unhappiness was the motivation behind the Union's ultimate request for his termination rests upon much less stable ground.

If an employee is discharged for a lawful reason, the presence of an antipathy based upon considerations of union membership does not make the discharge unlawful. *Frosty Morn Meats, Inc. v. NLRB*, 296 F.2d 617 (5th Cir. 1961); and the Board may not infer an unlawful motive if it could just as reasonably infer a lawful one. *NLRB v. Huber & Huber Motor Express Co.*, 223 F.2d 748 (5th Cir. 1955). Moreover, a party may change its reason for undertaking a particular act from an unlawful to a lawful one, and the Board has often been criticized by the courts for failing to consider evidence of such a change in position. *E.g.*, *McLeod v. Chefs, Cooks Local 89*, 280 F.2d 760 (2nd Cir. 1960); *Graham v. Retail Clerks*, 47 LRRM 2009 (D. Mont. 1960).

In fact, the Board did not seriously consider the Union's argument that after the first meeting it was proceeding solely on the basis of its opinion that the hiring hall provisions of the contract had been violated; and a careful reading of the Trial Examiner's opinion adopted by the Board makes clear that at least one of the reasons for ignoring the Union's argument was the Trial Examiner's conclusion that the Union's position with respect to the hiring hall was



legally incorrect.<sup>1</sup> In reaching that conclusion, the Trial Examiner (and the Board) ignored the realities of the operation of a hiring hall; and they overstepped their own jurisdiction by positing their own interpretation of the agreement as the only legally correct one, without regard to the Union's offer to submit the issue to the contractual grievance procedure.

The issue concerns the meaning of Article II, Section 7 of the agreement (G.C. Ex. No. 7), which provides that "If the Union is unable to furnish qualified workmen within 48 hours after an Employer calls for them, the Employer shall be free to procure the workmen from any other source or sources". Assume, for purposes of argument, that an employer places a call with the union's dispatcher at 9:00 o'clock on Monday morning for a steamfitter capable of performing boiler control work. Assume, further, that the out-of-work list contains the names of 50 steamfitters at the time the call comes in. Assuming there is no question as to the *bona fides* of the employer's request (i.e., that he is not using a special skills call to get a particular applicant off the list, or to avoid using the list), the contract requires the Union to honor the request by dispatching "persons possessing such skills and abilities in the order in which their names appear on the out-of-work list". (Art. II, Sec. 5(c)). The dispatcher makes that determination on the basis of information supplied by the applicant, and his own knowledge, if any, of the applicant's skills and abili-

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1. It is true that the Board in its opinion (Vol. I Tr., p. 38, fn. 2) finds it unnecessary to rely upon the reasoning contained in the ultimate paragraph of the Trial Examiner's opinion, to the effect that the decision would be the same even if it were found that Respondent acted in good faith in invoking the contractual provisions; but the implication that Respondent acted in bad faith rests in substantial part upon the Board's interpretation of the contract, and is not otherwise supported by substantial evidence.

ties. (Ibid.) Assume, then, that there are 10 out of the 50 steamfitters registered on the list whom the dispatcher believes, on the basis of their representations or the dispatcher's own knowledge, are capable of performing the work in question. He dispatches the first such applicant at 9:30 on Monday morning; the applicant reports to the contractor, believing him not sufficiently qualified, rejects him. The contractor therefore calls the union a second time, with the same request. Since dispatch hours are from 8:00 a.m. to 9:30 a.m. only (Art. II, Sec. 4(g)), the second man is not dispatched until the next day (Tuesday). If the contractor rejects the second, and perhaps the third, man as well, it is obvious that 48 hours will have elapsed long before the 10 presumptively qualified men have all been dispatched. The question is as to the effect of Article II, Section 7 in such a situation.

Chadbourne, and the Board, would say that he is free to hire outside the hiring hall if the Union has not supplied him with men *he considers to be qualified* within 48 hours of his first call. Such an interpretation is not consistent with the purposes of exclusive hiring hall in a skilled craft. The contract takes elaborate pains to assure that the skills level of the applicants on the out-of-work list will be maintained. They must have at least five years experience in the trade, and they must show qualifications by having completed an apprentice program, by passing an examination, or by evidence of previous satisfactory employment with a signatory contractor (Art. II, Sec. 1(b)). The applicants are presumptively qualified to perform work covered by the agreement, and the contractor, by signing the agreement, has committed himself to hire from among them unless there are none who meet his qualifications. The Chadbourne interpretation would seriously curtail employ-



ment opportunities for qualified applicants further down the list. It would also provide an employer who desired to avoid the list in order to hire his “own” man an easy means for doing so. In that connection, it would tempt an employer to state the requisites for the job in such a way that only his “favorite” could qualify. That is what the Union believed Chadbourne was doing here.

The Trial Examiner misconceived the Respondent’s interpretation of the disputed language. Respondent does *not* claim, as suggested by the Examiner (fn. 19, p. 9) that the out-of-work list must be exhausted before the contractor seeking a man with special skills could hire outside the hiring hall. Rather, it is the Respondent’s position that, *assuming a bona fide request for special skills is made*, the contractor must continue to call the hiring hall for men so long as there are registered applicants who claim, or who are known by the dispatcher to possess, the requisite skills and experience. It is only when a period of 48 hours elapses without the union being able to send anyone presumptively qualified that the contractor is free, under Article II, Section 7, to hire “off the street”. The phrase “qualified workmen” in Section 7 does not mean workmen whose qualifications satisfy the contractor, but workmen who, under the terms of the agreement, are presumptively qualified to perform the work. Thus, the Union was at odds with Chadbourne, who stated “I consider myself the one to qualify them, and not the Union” (*Tr. 68, line 21*).

Whether or not Respondent’s interpretation of the agreement is correct, it is certainly reasonable and arguable. This court has held that, where the Board finds it necessary to “construe” the collective bargaining agreement in order to find an unfair labor practice, the Board is without jurisdiction in the face of an arbitration clause. *NLRB v. C&C Plywood Corp.*, 351 F.2d 224 (9th Cir. 1965). At the very



least, good faith insistence by a union upon its interpretation of a collective bargaining agreement, in the context of an offer to submit the issue to the contractual grievance procedure, should not be relied upon as evidence of an unfair labor practice simply because the Board does not believe that the interpretation is proper.

JOSEPH R. GRODIN  
NEYHART, GRODIN & BEESON  
*Attorneys for Respondent*

August 1967.

#### **CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH R. GRODIN



NO. 21,743

In the United States Court of Appeals  
for the Ninth Circuit

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION NO. 38, UNITED ASSOCIATION OF JOURNEYMEN  
AND APPRENTICES OF THE PLUMBING AND  
PIPE FITTING INDUSTRY OF THE UNITED STATES  
AND CANADA, AFL-CIO, RESPONDENT

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On Petition for Enforcement of an Order of the  
National Labor Relations Board

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REPLY BRIEF ON BEHALF OF INTERVENOR

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FILED

OCT 18 1967

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OCT 18 1967





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On Petition for Enforcement of an Order of the  
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REPLY BRIEF ON BEHALF OF INTERVENOR

---

PRELIMINARY STATEMENT

The Intervenor in this case is Phillip Havill, an individual, who was the Charging Party before the National Labor Relations Board. This Brief is filed pursuant to Motion for Intervention granted by this Court on June 1, 1967 and pursuant to Stipulation approved by this Court on July 25, 1967, and pursuant to extension of time granted by this Court on September 5, 1967.



## STATEMENT OF THE CASE

Intervenor accepts and agrees with the statement of the facts set forth in the Board's Brief, and disagrees with the supplemental remarks and comments set forth in Respondent's Brief.

Intervenor also agrees with the arguments set forth in the Board's Brief. Hence, Intervenor does not consider it necessary to reply to the Board's Brief but rather to Respondent's Brief, and in so doing will, perhaps, supplement the Board's Brief.

### ARGUMENT IN REPLY TO RESPONDENT'S BRIEF

I. Respondent accepts virtually all of the Findings of Fact made by the Trial Examiner and by the Board:

Respondent, at the outset of its Brief, makes the following explicit concessions:

"The Statement of the case contained in the Board's Brief, (is) accurate enough as far as it goes \* \* \*.

"The Board made certain Findings of Fact \* \* \* While Respondent does not agree with all those Findings, it concedes that they are supported by substantial evidence within the meaning of applicable criteria limiting the scope of judicial review." (Brief for Respondent, page 1, emphasis added.)

Thus, the factual findings made by the Board (which affirmed those made by the Trial Examiner) are not in issue and must be sustained.





In addition, the "supplementary" facts referred to in Respondent's Brief are not properly before this Court. Although the Board, in its petition for enforcement, filed the entire transcript and record in this Court, it also filed a separate "Designation of Record" (dated May 4, 1967, and filed with this Court on or about the same date) in support of the "Statement of Facts on which Petitioner intends to Rely" (also filed at the same time). Such designation was filed pursuant to Rule 34(7)(b) of this Court. Said rule also explicitly requires a respondent to serve and file within ten days after receipt of petitioner's designation "a designation of additional portions of the record desired \* \* \*."

In the instant proceeding, the Board's Designation of Record (which is accepted by the Intervenor) identifies all portions of the transcript of hearing before the Trial Examiner which contains testimonial and evidentiary matter in support of the Trial Examiner's Findings of Fact and in support of the Board's Findings and Conclusions.

On the other hand, Respondent has not filed any counter or supplementary designation of the transcript or of evidentiary material upon which it seeks to rely.

While it may be said that literal and arbitrary adherence to technical rules may impede the ultimate cause of justice, Justice without rules is only a concept incapable of administration or application. Intervenor wishes this case to be decided on its merits but respectfully urges that the proper way to achieve such result is by compliance with the rules of this Court.





Thus, Respondent's supplemental statement of facts and reliance upon undesignated evidence is out of order.

II. Respondent's implied attack upon credibility findings of Trial Examiner and Board are without merit as a matter of law and without foundation in fact:

Respondent argues in its Brief that it demanded the discharge of Intervenor, Phillip Havill, for reasons other than lack of membership in Respondent Union. Respondent attempts to argue, while perhaps not explicitly, that the self serving testimony of Union business manager Mazzola and Union business representative Costello ought not to have been rejected and should have been credited over the testimony of Havill and company president Chadbourne. (See Respondent's Brief, pages 5.)

In reply to this argument, or arguments, the Court's attention is directed to the following significant points:

1. Respondent, by its letter dated September 22, 1964, O. I. Chadbourne, Inc., the employer, demanded the discharge of Intervenor, explicitly stating:

"You state that you have employed Mr. Phil Havill, a Non-Union man, as a steamfitter. \* \* \* I ask that you immediately correct this situation and get rid of all Non-Union men in your employ."  
(R. 17; G.C. Exh. 3).

2. Moreover, the Trial Examiner specifically found, as matter of fact, that Respondent caused Havill's discharge because of his non-membership in Respondent Union. The Board affirmed such finding of fact.





derive knowledge from Costello that Havill was not affiliated with the Respondent's parent organization, but also Costello's inquiry of Havill concerning the 'locals' out of which he had worked and Havill's response, plainly reveal Costello's awareness of Havill's 'non-union status.' " (R.16 ; Trial Examiner's Decision, page 4, Footnote 9.)

III. Respondent's contention that the Board erred in inferring an illegal motive when it might have inferred a legal motive is invalid as a matter of law:

The overwhelming and clear-cut weight of judicial authority is precisely to the contrary. See NLRB v. Walton Manufacturing Company, 369 U.S. 404, 82 S. Ct. 853, 7 L. ed. 329, 49 LRRM 2962 (April 9, 1962).

In Walton, the United States Supreme Court reaffirmed the rule it had set forth many years ago in Universal Camera Corporation v. NLRB, 340 U.S. 474, 27 LRRM 2373, that the reviewing court may not displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*.

See also the decision of this Court in Bon Hennings Logging Company v. NLRB, (C.A. 9), 308 F. 2d 548, 51 LRRM 2085 (September 4, 1962).

In the Bon Hennings case, this Court rejected exactly the same contentions made by the employer in that case as are being made by the Respondent Union in the instant case.





Thus, what is sauce for the goose must be sauce for the gander.

IV. Respondent's argument based upon its interpretation of the "48 hour" rule in the hiring hall clause of its collective bargaining agreement is fallacious and absurd:

Respondent's argument is set forth on pages 4-6 of its brief to this Court.

Article II, Section 7 of the collective bargaining agreement (G.C. Exh. 7) expressly provides as follows:

"If the Union is unable to furnish qualified workmen within 48 hours after an Employer calls for them, the Employer shall be free to procure the workmen from any other source or sources."

Succinctly stated, Respondent's argument boils down to a unilateral "interpretation" that the 48 hour period starts over and over again each time an employer rejects an applicant dispatched by the Union and that an employer must exhaust the Union's "out-of-work" list before he can hire an employee from any other source, or at least must exhaust the Union's list of applicants which the Union unilaterally considers qualified, regardless of the length of time such procedure might take, whether 48 hours, 480 hours, or 4800 hours.

It hardly needs to be demonstrated that acceptance of Respondent's theory, ingenious as it may be, would be to nullify this particular contract provision. The "48 hour rule" is clear and unambiguous on its face, and its legality is not in question.





Respondent virtually admits the weakness of its own argument by its detailed explanation of how the 48 hour rule is supposed to work" in Respondent's opinion. Thus, on page 5 of its Brief to this Court, Respondent states:

"If the contractor rejects the second, and perhaps the third, man as well, it is obvious that 48 hours will have elapsed long before the 10 presumptively qualified men have all been dispatched." (emphasis added)

As pointed out by the Board in its Brief, Respondent maintained at the hearing before the Trial Examiner that Havill's qualifications to perform the work in dispute are not at issue here." (Tr. 102); and the record is clear that Havill was qualified (Tr. 102-105).

Moreover, the Trial Examiner's Decision affirmed by the Board, specifically points out the following significant facts:

"There is more than a faint suggestion in the record that Costello had actually exhausted the out-of-work list when on August 26 he dispatched Harold Stone whom Chadbourne found was not suitable for boiler work. Costello testified that at the time of Stone's referral there were probably 55 to 60 men on the list; that he 'proceeded to call down the list, explaining first the nature and type of job and proceeded to exhaust the list until -- (he) could acquire





someone who would take this job referral'; and that such person was Stone who 'was the only man that would take the job.'" (R. 21; Trial Examiner's Decision, page 9, Footnote 18)

In this connection, see also letter dated September 9, 1964 from D. I. Chadbourne, Inc., to Respondent explaining rehiring of Havill, in accordance with the Union contract, after waiting not only 48 hours but for more than a week, and trying out three or four applicants dispatched by the Union who proved to be unqualified for the job involved. (G.C. Exh. 2). See also letter dated October 28, 1964 from D. I. Chadbourne, Inc., to Respondent, reluctantly complying with Respondent's demand for the discharge of Havill, and stating, in part, as follows:

"Mr. Havill was hired only after the Union was unable to supply a qualified man. When he went to the Union, he was told he could not join. \* \* \*.

"I am sorry that you feel it necessary to force me to lose a qualified employee. I am doing so only to avoid trouble, not because it's right." (G.C. Exh. 6)

With the utmost respect for the able counsel for Respondent, certainly nothing more is involved in this "defense" than a tongue in cheek effort by a great lawyer to try to make some colorable defense for his client in an impossible case.





V. Respondent's argument that there is an issue involving the grievance-arbitration provision of the Union contract is not supported by the evidence and is contrary to the evidence:

Although Respondent in its Brief does not specifically cite the applicable contract section, Article II, Section 10 of the contract provides for a grievance-arbitration procedure for determining disputes involving the operation or application of the Union hiring hall. (G.C. Exh. 7). Respondent's argument is prefaced by the following statement:

"Whether or not Respondent's interpretation of the agreement is correct, it is certainly reasonable and arguable." (Brief for Respondent, page 6).

Such statement, of course, in and of itself betrays the glaring weakness in Respondent's position as demonstrated in detail above.

Respondent then contends that the Board had no jurisdiction to issue its decision and order in the instant case "in the face of an arbitration clause." (Brief for Respondent, page 5).

Without belaboring this point, and without labeling it a "red herring," it is crystal clear from the record that the Union never submitted this alleged issue of contract interpretation or contract violation to the contractual grievance-arbitration procedure. In fact, assuming it could have done so, the very fact that it never did so demonstrates the fallacy (if not deceptiveness) of Respondent's argument.





As specifically found by the Trial Examiner and the  
board: "There is no evidence that the Union itself ever sub-  
mitted the propriety of its demand for Havill's discharge to  
its Committee." (R. 19; Trial Examiner's Decision, page 7,  
footnote 14).

Thus, Respondent's "argument" is simply not applicable  
to the facts of this case.

Moreover, it must be remembered that Respondent origi-  
nally and unequivocally demanded Havill's discharge by letter  
dated September 22, 1964 to D. I. Chadbourne, Inc., saying in  
many words "get rid of all Non-Union men in your employ," and  
identifying Havill by name as "a Non-Union man." (G.C. Exh. 3).

For the Union now to argue that it later changed its  
mind and demanded Havill's discharge only because of some claimed,  
never prosecuted nor ever presented, violation of its uni-  
federal interpretation of the contract hiring hall clause can  
hardly be done with a straight face, much less taken seriously by  
this Court.

Thousands of cases attest to the fact that employers  
have been found guilty of discharging employees for union member-  
ship or activity, and their pleas of innocence, based upon law-  
ful economic motivation or reasonable contract interpretation  
reiterate in vain throughout volumes of NLRB reports and Court  
decisions. Surely, Mr. Havill, the Intervenor, can rely upon  
this Court to see through the same pretext and subterfuge on the  
part of Respondent Union in a case where the shoe is on the other  
foot, but where the identical principles of law apply.





VI. Respondent's argument based upon its alleged good faith is unmeritorious and invalid as a matter of law:

Respondent, in its closing argument, seeks to justify its unlawful conduct by asserting its "good faith insistence by its union upon its interpretation of a collective bargaining agreement, in the context of an offer to submit the issue to the contractual grievance procedure." (Brief for Respondent, page 7).

First of all, as demonstrated above, Respondent never offered to submit this (or any other) issue to the contractual grievance procedure.

Secondly, the defense of good faith is obviously misplaced. The absence of good faith is not a legal element in a violation of Section 8(b)(2) of the Act. This is not a case involving Section 8(a)(5) or Section 8(b)(3) where good faith is an essential element because the violation involved in those sections are a "refusal to bargain in good faith."

The United States Supreme Court in NLRB v. Burnup and Smith, Inc., 379 U.S. 21, 57 LRRM 2385 (1964) squarely held that good faith was no defense to an employers discharge of an employee. Again, what is sauce for the goose must be sauce for the gander.

#### CONCLUSION

Finally, reference is respectfully made to an article by Judge Henry Friendly in his continuing struggle to improve the administration of justice after leaving the bench of the United States Court of Appeals for the Second Circuit. The article, entitled "Satisfaction, Yes - Complacency, No!," appears in the





August, 1965 issue of the American Bar Association Journal and  
based upon a speech delivered on May 21, 1965 at the annual  
dinner of the American Law Institute.

In that article, Judge Friendly asks the following  
question:

"Is it really sensible that if Jim Smith  
loses his job for a couple of months through  
a discriminatory discharge, he should have to  
wait several years for the few hundred dollars  
he needs now - even if it is the public trea-  
sury that spends the many thousands of dollars  
required under existing procedures to procure  
that trifling sum for him?"

Indeed, the maxim "Justice delayed is Justice denied"  
is complex. But, the instant case dramatizes and emphasizes  
Judge Friendly's illustration in a much stronger and much more  
tangible manner. Intervenor, Phil Havill, lost his job as a  
result of the unlawful conduct of Respondent Union in October,  
1964. Mr. Havill promptly filed the original unfair labor  
practice charge in this matter approximately one or two days  
later. It is now almost three years later, and the issue has  
still not been resolved.

Moreover, this case does not involve a "few hundred  
dollars." According to a computation submitted on behalf of the  
Intervenor to the Regional Office of the NLRB in the summer of  
1966, the total back pay due was almost \$16,000.00 as of the end  
of July, 1966. Upon further and detailed investigation by the





Regional Office, the back pay was computed to be over \$13,000.00. Respondent was so notified on October 14, 1966.

This case was referred by the Regional Office to the Board in Washington in December, 1966 for enforcement upon notification from Respondent Union that it refused to pay more than a few hundred dollars in back pay.

It is the belief and conviction of the undersigned Counsel for Intervenor that if the Board's decision and order is enforced by this Court, Respondent Union will then demand a back pay hearing which will involve another hearing before a trial examiner, another appeal to the Board in Washington and another enforcement proceeding before this Court. It does not seem preposterous to suggest that this will involve another three years of delay. By that time, with interest, the total back pay due will be in the neighborhood of \$20,000.00. This is a substantial sum which makes Judge Friendly's question all the more important and urgent.

Moreover, this is not a case involving a non-union employee. Intervenor, Phil Havill, was a member of the Electrician's Union and other unions, and wanted to be a member of the Plumbers Union, but Respondent operates a "closed Union" and was unwilling to admit Havill into membership, claiming that it had too many members on the bench (i.e., out of work). Similarly, the employer in this case was a union contractor, party to a collective bargaining agreement, and trying to comply with the terms and provisions of said agreement while at the same time attempting to secure his rights guaranteed under said agreement.



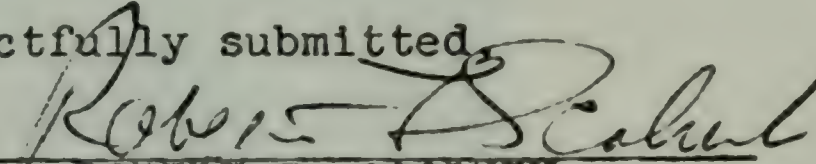


Concededly, perhaps, the foregoing comments, by way of conclusion, are outside the technical boundaries of legal argument before this Honorable Court. Perhaps they involve philosophy, legal or social. But the quest for Justice, whether in the abstract or in the practical day to day affairs of life, cannot be completely separated from Philosophy.

Whether this Court in this case can solve the bigger problem, raised by Judge Friendly and many other erudite thinkers, is a difficult question in and of itself. Surely, this Court will try and will issue a decision which it considers proper under all the circumstances.

If this Court feels that it can take a giant step forward in this case, history will record that the first real step was taken by the United States Court of Appeals for the Ninth Circuit.

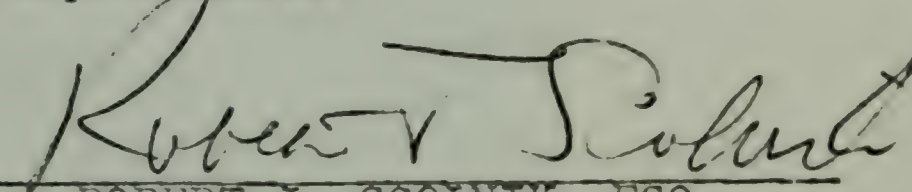
Respectfully submitted

  
ROBERT J. SCOLNIK  
Attorney for Intervenor

October, 1967.

#### CERTIFICATE

The undersigned certifies that he had examined the provisions of Rules 18, 19 and 39 of this Court, and in his opinion the tendered brief conforms to all requirements.

  
ROBERT J. SCOLNIK, ESQ.





No. 21745

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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SIGNAL OIL AND GAS COMPANY,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

---

## BRIEF FOR APPELLANT.

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FILED

OCT 5 1967

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SIGNAL OIL AND GAS COMPANY,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

---

**BRIEF FOR APPELLANT.**

---

I.

**Jurisdictional Statement.**

This is a petition to review and set aside an order of the National Labor Relations Board, hereinafter referred to as "the Board," entered on August 24, 1966, finding that the petitioner had engaged in unfair labor practices within the meaning of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 USC 151 *et seq.*,<sup>1</sup> hereinafter referred to as "the Act."<sup>2</sup>

The underlying action was brought by National Labor Relations Board, Region 31, for alleged unfair labor practices arising out of the discharge of an employee, Louis E. Evans, pursuant to Section 10(b) of the National Labor Relations Act.<sup>2</sup>

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<sup>1</sup>The Board adopted as its order the recommended order of the trial examiner dated May 18, 1966, with modifications, which are set forth in Appendix "A".

<sup>2</sup>29 USC 160(b).

The petitioner Signal Oil and Gas Company, filed a timely petition to review and set aside the order of the Board dated August 24, 1966. This Court's jurisdiction accordingly rests upon 29 USC 160(f).

## II.

### Statement of the Case.

#### 1. The Action as Brought Under National Labor Relations Act.

This is an action initially brought by the National Labor Relations Board upon a charge filed by the Teamsters, Chauffeurs, Warehousemen & Helpers Local No. 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, alleging that petitioner had engaged in unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act when petitioner discharged an employee, Louis E. Evans. Mr. Evans was discharged by petitioner on September 30, 1965, following the employer's investigation which preceded and followed an expression by the employee regarded by the Board as an expression of support and sympathy with the Oil, Chemical and Atomic Workers International Union AFL-CIO, Local 1-19, hereinafter referred to as "The Oil Workers."

Petitioner is a company whose principal place of business is in Los Angeles, California and who is engaged in producing, refining and selling petroleum products. It maintains and operates a petroleum refinery in Bakersfield out of which petroleum products are distributed. The employee, Evans, was engaged as a



truck driver in the Marketing Transportation Department located a mile from the refinery, and picked up products from the refinery for deliveries to customers.

Following the filing of a complaint by the Regional Director of the Board for Region 31, a hearing was held on January 27, 1966 before the trial examiner, Louis S. Penfield, whose decision and recommended order was rendered on May 18, 1966 finding that petitioner had engaged in unfair labor practices and ordered petitioner to take the action specified therein as contained in Appendix "A" hereto.

On July 5, 1966 petitioner took exception to the trial examiner's decision and order and the case was submitted to the Board on Briefs. On August 24, 1966 the Board entered its decision to affirm the rulings of the trial examiner and adopted the recommended order of the trial examiner as modified by the Board.<sup>3</sup>

## 2. The Facts of This Case.

The employee, Louis E. Evans, was employed as a marketing truck driver operating out of the Bakersfield Marketing Transportation office which is located in the vicinity of petitioner's Bakersfield Refinery,<sup>4</sup>

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<sup>3</sup>Appendix "A".

<sup>4</sup>TR p. 12 l. 7 and TR p. 79 l. 10, 14 the testimony shows the Marketing Transportation office had the same address as the refinery but was located a mile from the refinery. (NOTE: The reference "TR", "p", and "l" in footnotes refer to the reporter's transcript of the hearing before the trial examiner on January 27, 1967, made a part of the record by designation, and to the page and line referred to.)

and had been so employed until his discharge on September 30, 1965.

At the time of his discharge and prior thereto, the Refinery Workers were represented by the Oil Workers who were engaged in contract negotiations, whereas the marketing truck drivers were not represented by that union nor any other since 1962.<sup>5</sup>

On September 24, 1965 Evans was engaged by Walt Bright, a pumper gauger in Signal's pipeline division, in a conversation, in the presence of Fred Brown, a dispatcher-supervisor for petitioner and Evans' superior, in which Evans made a remark about the refinery employees' union activities. As to the contents of this remark, various versions were testified to at the hearing before the trial examiner. In response to a question from Bright about what Evans thought of the refinery employees voting for a strike, Evans testified his answer was "Good, good, I hope they do."<sup>6</sup> As to the remark made by Evans, James Rasbury, a witness for petitioner at the hearing before the trial examiner, testified he was told the response was "Good, it will teach this cheap company a lesson."<sup>7</sup> As to this same remark, Malcolm Dawson, also a witness for petitioner, testified the remark was "I hope they do, maybe it will teach this cheap company something."<sup>8</sup>

On September 24, 1965, Brown, Evans' Supervisor, during a routine phone report, to his department manager Dawson, reported on Evans' retort.<sup>9</sup>

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<sup>5</sup>TR p. 8 l. 20-26 and p. 9 l. 1-22. Stipulation that by election the truck drivers were not represented which election was certified by the Board on June 13, 1962.

<sup>6</sup>TR p. 15 l. 14.

<sup>7</sup>TR p. 37 l. 23.

<sup>8</sup>TR p. 79 l. 4-5.

<sup>9</sup>TR p. 85 l. 21 through p. 86 l. 9.



On September 28, or 29, 1965,<sup>10</sup> Dawson and Rasbury met with H. J. Stroud, petitioner's Vice President in charge of employee relations, at which time Evans' personnel file, his past demeanor and conduct, including his response to Bright about his opinion of the refinery workers' possible strike, were discussed.

The file showed that Evans was a chronic complainer, that he had been placed under surveillance because of a suspicion of stealing gasoline, and that he was under suspicion and investigation for filing an insurance claim seeking a reimbursement for his wife's medical expenses under petitioner's health and welfare policy, which was based upon fraudulent statements.<sup>11</sup>

Evidence at the hearing before the trial examiner showed that a decision was reached at this meeting to discharge this employee, after considering his past record. The evidence also showed that an additional fact was considered at this meeting which entered into the decision to discharge this employee, that of lack of work at the unit in which this employee was working. The consequence of this meeting was the discharge of Evans on September 30, 1965,<sup>12</sup> through his supervisor, Brown, at which time he was shown a termination slip, which Evans refused to sign which designated that the reason for discharge was "poor attitude. I feel that both the company and the employee will be better off if he is terminated."<sup>13</sup>

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<sup>10</sup>TR p. 36 l. 17-19.

<sup>11</sup>TR p. 38 l. 7 through TR p. 40 l. 11 and TR p. 71 l. 24 through p. 72 l. 8.

<sup>12</sup>TR p. 47 l. 9-15.

<sup>13</sup>Exhibit 3 introduced by respondent at hearing before trial examiner on January 27, 1967; See also TR p. 47 l. 24-p. 48 l. 10 and TR p. 92 l. 3-25.



The case was taken before the Board who adopted the trial examiner's findings, conclusions and recommendations with modifications and issued its broad order to cease and desist from various discriminative practices, to post notices and to reinstate Evans with reimbursement of full pay<sup>13a</sup> and is now before this Court for review and to set aside the Board's order and the Board's answer requesting enforcement.

### III.

#### **The Questions Presented.**

1. Whether a statement of an employee was an expression of sympathy with, and support of, strike activities of fellow workers in another unit, and was of such character as to be a protected activity under the Act.

2. Whether an employer is precluded from examining the merits of, and discharging an employee for cause after he has expressed himself as being in favor of strike action by employees of another unit of his company.

### IV.

#### **Argument.**

##### **1. A Remark, to Be Protected, Must Be Within the Meaning of the Act.**

The significant fact upon which this case is predicated is a statement by Louis E. Evans on or about September 23, 1965, about the contents of which there is some conflict in the evidence. Evans testified before the trial examiner that he made a statement to another employee, Walter Bright, employed in the pipeline di-

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<sup>13a</sup>See Appendix "A" for text of order.

vision of the same company, in response to a question which he summarized to be what he (Evans) thought of the refinery's voting a union strike. His answer was "Good, good, I hope they do"; then Evans added "it is impossible that they couldn't go on strike because it would deadlock California."<sup>14</sup>

As to what Evans' statement contained and what was discussed in a meeting between Evans' Department Manager, the Manager of Personnel Employee Relations Department, and Vice President in charge of Employee Relations, there are some differences of opinion.

Rasbury, Manager of Employee Relations, recalled the statement reported as being made by Evans as "Good, it will teach this cheap company a lesson," while Dawson, Evans' department manager, testified "I hope they do, maybe it will teach this cheap company something."<sup>15</sup>

It is true that in all versions of the remark it is agreed that it contained an expression of hope that a strike by the refinery workers would occur, but the latter two versions contain the derogatory remark "this cheap company." It is the latter versions of the remark that were given consideration at this meeting. On this point the trial examiner concluded that in view of the conflict, the only point worth considering was the point in the remark about the strike and he dismissed what he termed an "unflattering remark" about the employer without any consideration.<sup>15a</sup> When reviewing the

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<sup>14</sup>TR. p. 15 l. 12-17.

<sup>15</sup>TR p. 79 l. 4, 5.

<sup>15a</sup>D. p. 3 l. 47 Footnote 2. (NOTE: The reference "D" as used in the footnotes refer to the trial examiner's decision dated May 18, 1966 which is made a part of the records by Petitioner's designation.)



personnel file of an employee which contained several reports of misconduct, as did the Evans' file, a seemingly insignificant remark like "this cheap company" becomes one more piece of the undesirable picture of this employee and certainly leans heavily to reflect the employee's attitude towards his employer.

Despite the variations in the statement, what is also significant is the circumstances under which the expression was uttered. As already pointed out, the statement was made by the invitation of a question and was not initiated by Evans through his own volition. No evidence was given that indicated Evans had any grievances against the company, nor was any evidence given that Evans was involved whatever in any union activities. On the contrary, as to the latter point, the trial examiner found that Evans had not even talked to refinery employees about the strike,<sup>16</sup> indicating Evans could not have given encouragement or support to members of that unit.

No evidence was presented of facts either preceding or succeeding the celebrated remark of Evans that would permit the examiner of facts to conclude intent, design, plan, scheme or other use of the remark.

The trial examiner concluded that the remark was not a call by Evans to concerted action<sup>17</sup> but was a protected activity because "it does express support by Evans of such action (to strike) by his fellow employees in another unit,"<sup>18</sup> and thus was entitled to protection of the Act.<sup>19</sup>

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<sup>16</sup>D. p. 4 l. 37-39; TR p. 24 l. 20-22.

<sup>17</sup>D. p. 5 l. 47.

<sup>18</sup>D. p. 5 l. 47.

<sup>19</sup>National Labor Relations Act, 1947 as amended by Public Law 86-257, 1959. Section 7. See 29 USCA Section 157.



The trial examiner bases his decision on two conclusions: (1) that Evans made his remark in hope of reciprocal support by the employees of the other unit,<sup>20</sup> and (2) that Evans made his remark in anticipation that he or his group might receive similar support (from the refinery workers) should the occasion arise.<sup>21</sup>

In the first place the conclusions are not founded on any evidence in the record but are mere assumptions that Evans expected reciprocal support or anticipated action by the group of which he was a member. The evidence itself goes contrary to these assumptions.

As a matter of logic, if Evans wanted the reciprocal support of the other unit which, at the time of his remark was involved in collective bargaining, he would have at least discussed the strike with the refinery workers. Evans testified that he did not discuss the strike with refinery employees, nor was any evidence offered that he ever had any discussions about any other union matters, therefore, no expression of support was communicated by Evans to the refinery group, nor is there evidence that Evans ever intended such an expression.

The entire record is replete with the absence of evidence that Evans or any of the workers in his unit were anticipating any activity that would have required support of the refinery workers.

The trial examiner held that the remark was not a call to concerted action yet concluded that it was concerted through what he erroneously found to be an expression of support without qualifying who the ex-

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<sup>20</sup>D. p. 5 l. 50.

<sup>21</sup>D. p. 5 l. 53-54.

pression would help. The record indicated that only Bright, an employee in still another entirely separate unit (the pipeline division of the company) and his supervisor, Fred Brown, heard the remark.<sup>22</sup>

Whether an activity is protected or not, depends not only on the wording and purposes of the Act, but on the precise nature and effect of the employee's conduct." *International Ladies Garment Workers Union, AFL-CIO v. N.L.R.B.*, 299 F. 2d 114, 117. The Act, in Section 7 thereof, reads in part as follows:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

Under no circumstances did Evans' conduct at any time surrounding his remark indicate any concerted activity for the purpose of collective bargaining or other mutual aid or protection. The Second Circuit held that for a remark to be protected, the subject matter must be concerned with present or future collective bargaining or with the employee's mutual aid or protection. *N.L.R.B. v. Jamestown Veneer & Plywood Corp.*, 194 F. 2d 192. In that case four employees walked off the job (in protest of the refusal of the

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<sup>22</sup>TR p. 14 l. 3-16 and TR p. 32 l. 8-10.



employer to reinstate four other employees) and were not recalled for work by the employer. The trial examiner found that the walkout was in protest of notice of lay-off but the circuit court held that there was no relation to the walkout and notice of lay-off because there was no labor dispute pending on notices of lay-offs.

Similarly, in this case there was no evidence that either Evans, or Bright, or the unrepresented groups of which they were a part, at that time, or in the near future, contemplated either organizational activities, other action for their mutual aid or protection, or action in support of the refinery employees represented by the Oil Workers. Furthermore, it should be noted that there is no record evidence whatever that petitioner was hostile to the oil workers or opposed in any way the exercise by its employees of their organizational rights, whether they were represented or unrepresented.

“. . . (F)ederal Appellate Courts have consistently held that concerted activity is protected only where such activity is intimately connected with the employee's immediate employment,” or relate to “organizational matters” or be “germane to the employment relationship” *N.L.R.B. Bretz Fuel Co.*, 210 F. 2d 392, 396. See also *Jefferson Standard Broadcasting Company*, 94 N.L.R.B. 1507, 1511-1512. For Evans' remark to be accorded a protected status it must be intimately connected or germane to his or Bright's immediate employment and not to a remote group whose status or bargaining objectives are not indicated as being known by Evans.

The authorities also show that for employee action to be “protected”, it must be engaged in according to a



“plan” or a “joint scheme” or a “pre-existing group understanding.” *General Electric Company*, 155 N.L.R.B. No. 24 pages 16-18. *N.L.R.B. v. Texas Natural Gasoline Corp.*, 253 F. 2d 322 (C.A. 5). None of these tests is met by Evans’ remark. Most pertinent in this connection is the Board’s recent decision in *Continental Manufacturing Corporation*, 155 N.L.R.B. No. 26. In *Continental*, during a period of employee unrest and at a time when the dischargee, Ramirez, was acting jointly with another employee to police the unsanitary rest room facilities used by the employees and for which the employees had been criticized, Ramirez wrote, and gave to, a company owner, a letter critical of management, of employee working conditions, of company supervisors, and of the rest room maintenance. The letter was phrased to indicate that it was a protest on the part of both Ramirez and her fellow employees. Thus, it spoke of “our need for money”, “the majority of employees”, “we believe in”, and “we had to ask, etc.”. The letter resulted in Ramirez’ discharge for insubordination. The Board, overruling the trial examiner, held that Ramirez had not engaged in a protected activity when she wrote the letter. Thus, despite the context in which the letter was written and its specific phraseology, the Board concluded that Ramirez was acting for herself and not on behalf of her fellow employees.

It cannot be shown that Evans made his remark pursuant to or in conjunction with any plan, joint scheme or pre-existing group understanding. His remark was a spontaneous answer to a direct question, the thought process of which obviously took only seconds, according to recorded testimony of Evans.

The Third Circuit echoes the Second Circuit. In *Mushroom Transportation Company, Inc. v. N.L.R.B.*, 330 F. 2d 683, 684-685 (C.A. 3), a case which involved a factual pattern equivalent to that which exists in this case, the Court found one Keeler, an extra driver, had been in the habit of talking to other employees and advising them as to their rights. The subject of these conversations were principally holiday pay, vacations and the employer's practice of assigning trips to drivers of other companies rather than to its own regular drivers. The employer discharged Keeler on the ground that he was a "crackpot" and because he had the reputation for being a troublemaker. The Board found, and the Court agreed, that Keeler's activities in general were directly related to the employees' legitimate interests in terms and conditions of employment, and that Keeler had not acted in his personal interest so as to assure his employment on the regular driver list. The Court, however, held that Keeler, in his contacts with the other employees, had not engaged in concerted activities for the purpose of mutual aid or protection within the meaning of Section 7, and that the employer had not violated the Act by discharging him. The Court said:

"We look in vain for evidence that would support a finding that Keeler's talks with his fellow employees involved any effort on *his* or *their* part to initiate or promote any concerted action to do anything about the various matters as to which Keeler advised the men or to do anything about any complaints and grievances which they may have discussed with him. It follows that, if we were to hold that Keeler's conversations constituted concerted activity, it could only be upon the



basis that any conversation between employees comes within the ambit of activities protected by the Act provided it relates to the interests of the employees. We are unable to adopt this view . . .

*Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted activity, and, if it looks forward to no action at all, it is more likely to be mere 'gripping.' [Emphasis supplied.]*"

In sum, Evans' remark, which certainly did not contemplate "group action" by Evans, Bright or the other unrepresented employees, cannot be regarded as a "protected" statement, and the trial examiner's finding to the contrary is clearly erroneous.

**2. Discharge for Cause Is Within the Sole Judgment of the Employer and Is Not Lost Because of a Remark of Union Sympathy.**

The record shows that Evans' discharge on September 30, 1965 was preceded by a meeting between the manager of his department, the manager of the Employee Relations Department and the Vice President in charge of employee relations, on September 27 or 28, 1965, about three days after Evans' remark about the strike action he believed was being considered by the refinery workers.

At that meeting the personnel file and the oral evaluations of Evans were discussed which summarized that



Evans was a constant griper and complainer, that he was then under suspicion of stealing gasoline for use in his own car and that he was under investigation for making fraudulent statements in an insurance claim for refund of money spent for his wife's medical expenses.<sup>23</sup> At the hearing before the trial examiner the charge of being a constant griper and complainer and of being suspected of stealing gasoline went entirely uncontradicted, however, the fraudulent statements in the insurance claim was disputed.

As to the conduct of Evans, as revealed by the evidence, the trial examiner made no finding of fact whatever and minimized almost into oblivion the employee's misconduct as being a factor to be considered in the discharging of the employee.<sup>24</sup> His conclusion, although mildly stated, suggests that Evans' misconduct was a justification for discharge "but for" the remark which he termed to be protected.<sup>24a</sup>

The trial examiner bases his decision that there was discrimination against this employee in violation of Section 8(a)(3), on three conclusions, (1) that there was no showing that Evans' conduct would have come to the attention of higher management at this time, but for the remark made about the refinery workers,<sup>25</sup> (2) that action was taken by higher management because of the remark, is contrary to petitioners claim that the remark was "casual and innocuous",<sup>26</sup> and (3) that the "process of escalation" carried an impact that precipitated the investigation in the first place.<sup>27</sup>

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<sup>23</sup>TR p. 38 l. 7 through p. 39 l. 4.

<sup>24</sup>D. p. 5 l. 14-17.

<sup>24a</sup>D. p. 5 l. 34.

<sup>25</sup>D. p. 5 l. 19-20.

<sup>26</sup>D. p. 5 l. 21-22.

<sup>27</sup>D. p. 5 l. 31-32.

Common in these conclusions of the trial examiner is the point that after Evans made his remark, he was evaluated as an employee by “higher management.” The trial examiner made no explanation of what was unusual by higher management being involved in personnel matters when two of the members in the meeting reviewing this employee were directly responsible for overall company personnel, that is, the Vice President in charge of employee relations and the Manager of the Employee Relations Department.

The facts show that the meeting, involving what the trial examiner terms as “higher management”, was not called because of this employee, but because of problems in an “entirely different area of the company.”<sup>28</sup> This tends to show that the Evans’ remark was not the reason for calling the meeting that the trial examiner erroneously infers.

Furthermore, the record clearly shows that prior to making of the remark Evans’ conduct was the subject of conversation between his Department Manager and the Manager of Employee Relations,<sup>29</sup> establishing that a practice existed of oral discussions of employee problems between line management and personal administration.

Dawson, Evans’ Department Manager, testified he was informed of a previous statement, sounding of insubordination.<sup>30</sup> While this statement was not considered in the meeting, it must be considered as part of

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<sup>28</sup>TR p. 37 l. 13-16; See also TR p. 83, l. 7.

<sup>29</sup>TR p. 81 l. 23 through p. 82 l. 15.

<sup>30</sup>TR p. 81 l. 5-8 Mr. Brown (Evans’ supervisor) reported to Dawson that Evans said, “If the company don’t like the way I do things, they can get my check.”



the facts that contributed to the consideration of Evans' discharge, on the basis of his conduct.

The record further shows that consideration of this employee at the time of the meeting with the Vice President was an after-thought and not a part of the planned agenda.

The assumption of the trial examiner that the questioning of the desirability of Evans as an employee because of his remark is further negated by the fact that he was then still under investigation for wrongfully taking gasoline and for making fraudulent statements. For the trial examiner to conclude that the desirability of this employee would not have been questioned had the remark never been made, is a flagrant disregard of these two important facts.

The trial examiner's further conclusions that (a) action was taken by higher management because of the remark is contrary to petitioner's claim that the remark was "casual and innocuous"; and (b) that the process of escalation carried an impact that precipitated the investigation in the first place, are assumptions without factual support, that can only be based upon the illogical reasoning that because management of employee relations functions (Manager and Vice President) was involved in this employee's discharge, it must have been because of the employee's remark about the refinery workers' proposed strike.

To show that the trial examiner's reasoning goes aground is the added fact contained in Rasbury's (Manager of Employee Relations Department) testimony that he and Dawson were meeting with the Vice President on an entirely different personnel problem.<sup>31</sup>

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<sup>31</sup>TR p. 37 l. 13-16 See also p. 83 l. 7-9.



What the trial examiner has concluded by his decision is that although the employer had justifiable reasons for discharging Evans, the discharge nevertheless became unlawful merely because it was Evans' remark that brought about the evaluation of him that lead to his discharge. Thus, in practical effect, the trial examiner held that Evans' remark precluded all action by the employer against him, regardless of justification or cause. This is the crucial issue in this case.

It is elementary that if the discharge of an employee is actually motivated by a lawful reason, the fact that the employee is engaged in protected activities at the time will not tie the employer's hand and prevent him from the exercise of his business judgment to discharge the employee for cause. *Pathe Laboratories, Inc.*, 141 NLRB 1290, 1299, 1303; *N.L.R.B. v. Ace Comb Company*, 342 F. 2d 841, 847 (C.A. 8). The Board thus expressed the matter in *Mitchell Transport, Inc.*, 152 NLRB No. 10, p. 3: "Engaging in protected, concerted activity, such as the filing of contractual grievances, *does not perforce immunize employees* against discharge for legitimate reasons." (Emphasis supplied.) This language was expressly repeated by the Seventh Circuit in affirming the Board's dismissal of the complaint in the *Mitchell Transport* case. *Hawkins v. N.L.R.B.*, 61 L.R.R.M. 2622, 2624. And the Fifth Circuit similarly stated in *N.L.R.B. v. Huber & Huber Motor Express*, 223 F. 2d 748, 749:

Where a legal ground for discharge existed—as it did in this case—and the employee was discharged on that ground alone, obnoxious conduct on his part, in an activity protected by Section 7 of the Act, *will not insulate* him from being discharged on such legal ground. (Emphasis supplied.)

*Accord: N.L.R.B. v. Blue Bell, Inc.*, 219 F. 2d 796, 798 (C.A. 5); *Southern Oxygen Co. v. N.L.R.B.*, 213 F. 2d 738, 742 (C. A. 4). The same basic principle was followed by the Board in *Redwing Carriers, Inc.*, 137 N.L.R.B. 1545, 1547, *aff'd*, 325 F. 2d 1011 (C.A.D.C.). There, the Board held that although employees who refused to cross a picket line at the premises of another employee engaged in protected concerted activity, they nevertheless could validly be discharged if their employer acted only to preserve the efficient operations of his business and terminated the employees in order to get replacements. *Cf. N.L.R.B. v. Rockaway News Supply Co., Inc.*, 345 U.S. 71; *L. G. Everist, Inc.*, 142 N.L.R.B. 193.

Two recent Board cases are directly in point. In each, the Board affirmed the principle that even though an employer's close scrutiny of employee protected activity leads the employer to discover, or uncover, conduct justifying a discharge for cause, an ensuing discharge for the reason thus uncovered does not violate the Act. Thus, in *Harold Brown Co.*, 145 N.L.R.B. 1756, 1766-1767, 1770, 1772, three employees were discharged for drinking an alcoholic beverage in the company's plant. On the day the drinking occurred, the company's vice-president indicated that no action would be taken against the employees because he was doubtful that the beverage was alcoholic. However, six days later, and as a result of evidence uncovered in a "further investigation", the employees were discharged. Such "further investigation" concerned not the drinking incident, but rather the company's close scrutiny of employee conduct connected with a Board-conducted election which the union won—employee conduct which,



clearly, was “protected”. The Board affirmed the Trial Examiner’s conclusion that the discharges were lawful, and in so doing, approved the Trial Examiner’s reasoning (145 N.L.R.B. at 1772) that:

The most accurate appraisal, in my view, is that, absent the election, Respondent would have not investigated the cider incident as thoroughly as it did, including on-the-spot use of Attorney Crawford and the taking of affidavits. In a sense, at this point, it can be said that there is a “*but for*” situation. But for the election and the investigation to secure grounds for [election] objections, the evidence, on which Respondent states that it relied for its conclusion that the cider was alcoholic and on the basis of which it allegedly made the discharges, would not have been developed as fully as it was. *This “but for,” however, is not enough to establish illegality.* (Emphasis supplied.)

Similarly, in *Norge Division, Borg-Warner Corporation*, 155 N.L.R.B. No. 95, the employer discharged two probationary employees who had repeatedly complained about their foremen, about interim layoffs allegedly not in accordance with seniority, and about their “unfair treatment”. The employees were discharged when the employer concluded that their “overall attitude” was undesirable. The Board, reversing the Trial Examiner, held that the discharges did not violate Section 8(a)(1). The Board assumed that the employees’ conduct in voicing their complaints constituted concerted activity for mutual aid or protection within the meaning of Section 7, but then said (pp. 3-4, slip op.):

But even on that assumption, we are unable to concur in the Trial Examiner’s conclusion that the



two employees were unlawfully terminated. The crucial question, as we see it, is . . . what in truth impelled the discharges. Were the employees terminated because they engaged in concerted activity? Or were they terminated for some other and legitimate reason that would have impelled the Respondent to take such action even independently of their concerted activity? On the particular facts of this case, we are persuaded that the latter alone formed the motivating basis for the terminations.

Though the trial examiner chose to disregard the facts pointing to grounds for discharge entirely unrelated to Evans' remark about the refinery strike, such facts nonetheless existed without contradiction (except as to the insurance claim) any one of which is a lawful ground for discharge unto itself. For an employer to discharge an employee lawfully, he needs no reason whatsoever so long as the motivation is not violative of the Act. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1. The facts in this case clearly show that the employer's motivation was prompted by the poor qualities of Evans as an employee and in no way by what he said in his answer to Bright.

### **3. The Board Has Not Met the Burden of Proof.**

The trial examiner, and hence the Board by its adoption of decision of the trial examiner, with minor modifications, is required to meet the burden of proving that there was a protected activity in the remark by Evans of agreement with the refinery workers' proposed strike, as protected by Section 7 of the Act, and that discharge of Evans was because of his remark and that such discharge was unlawful and in violation of Section 8(a)(1) and 8(a)(3) of the Act.

This requirement of proof is set forth as follows in *N.L.R.B. v. Redwing Carriers, Inc.*; 284 F. 2d 397, 402:

“This Court, in common with the Courts of Appeals of other circuits, has frequently been faced with the necessity of determining whether a finding by the Labor Board that an employer is guilty of discriminatory firing, is supportable under the recognized legal standards, i.e., substantial evidence on the record taken as a whole. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456. Many such cases present difficult problems for the court to decide whether the motivating cause of discharge is the one assigned by the company or is a desire to get rid of an employee active in union affairs or other protected activity. The guides to decision in such cases are to be found in the prior decisions of this Court. The opposition of an employer to union organization and even unlawful interference are not enough without more to make the discharge of an employee wrongful.” *N.L.R.B. v. Hudson Pulp & Paper Corp.*, 5 Cir., 273 F. 2d 660; *N.L.R.B. v. McGahey*, 5 Cir., 233 F. 2d 406.

In this case not one shred of evidence of opposition to union organization was given nor was there evidence that the employer interfered with any plan, scheme or action to organize. As to either of the charges against this employer, the record does not disclose any facts that meet the burden of proof required by law to establish the violation of either of Sections 7, 8(a)(1) and 8(a)(3) of the Act.

V.

**Conclusion.**

It is indisputably shown that the activity in the form of the employee's remark about his hopes that the refinery workers would strike was not a protected activity within the meaning of the Act, that the employee was discharged for cause and not because of his remark, and that the respondent failed to meet the burden of proof that there was an unlawful discharge; therefore, we respectfully submit that the Board's order is not in accord with the law or the evidence and should be set aside and its petition for enforcement be denied and the proceeding dismissed.

Dated October 2, 1967.

Respectfully submitted,

A. E. STEBBINGS,  
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*Attorneys for Petitioner.*





### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN G. KUCH









## APPENDIX "A."

### Recommended Order.

I. Recommended order of the trial examiner as contained in his decision of May 18, 1966, made a part of the record by designation of petitioner.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, I recommend that Respondent Signal Oil and Gas Company, its agents, successors, and assigns, shall:

1. Cease and desist from:

a. Interfering with the rights of its employees to engage in activities for their mutual aid and protection, or in support of any labor organization, by their discharge or other discriminatory treatment, or in any like or related manner restraining or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

a. Offer to Louis Evans immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights or privileges, and make him whole for any losses he may have suffered as the result of his discharge in the manner prescribed above in the Section entitled "The remedy."

b. Preserve and make available to the Board, or its agents, upon request, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to an analysis of the backpay due.



c. Post in conspicuous places at its usual place of business, including all places where notices to employees are customarily posted, copies of the notice attached hereto and marked Appendix A.<sup>4</sup> Copies of the said notice to be furnished by the Regional Director for the Thirty-first Region of the National Labor Relations Board, shall, after being signed by Respondent, be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in such conspicuous places. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

d. Notify the Regional Director of the Thirty-first Region, in writing, within 20 days from the receipt by Respondent of a copy of this Decision what steps Respondent has taken to comply therewith.<sup>5</sup>

II. Order of the National Labor Relations Board made August 24, 1966.

### ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order

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<sup>4</sup>In the event these recommendations be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of the United States Court of Appeals, the word "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER," shall be substituted for the words "A DECISION AND ORDER."

<sup>5</sup>In the event that these recommendations are adopted by the Board, Paragraph 2(d) thereof shall be modified to read, "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps Respondent has taken to comply therewith."

of the Trial Examiner, as modified below, and hereby orders that the Respondent, Signal Oil and Gas Company, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified.

1. Add the following as Paragraph 2(b) to the Trial Examiner's Recommended Order and consecutively reletter the present paragraph 2(b) and those subsequent thereto:

“(b) Notify the above-named employee, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.”

2. Add the following to the Notice attached to the Trial Examiner's Decision:

WE WILL notify the above-named employee, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

3. The address for Region 31, appearing at the bottom of the Notice attached to the Trial Examiner's Decision, is amended to read: 10th Floor, Bartlett Bldg., 215 West 7th Street, Los Angeles, Calif. 90014, Tel. No. 688-5850.





In the United States Court of Appeals  
for the Ninth Circuit

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SIGNAL OIL AND GAS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

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On Petition to Review and Set Aside and on Cross-Petition  
for Enforcement of an Order of the National Labor  
Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD

---

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**No. 21,745**

**SIGNAL OIL AND GAS COMPANY, PETITIONER**

*v.*

**NATIONAL LABOR RELATIONS BOARD, RESPONDENT**

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**On Petition to Review and Set Aside and on Cross-Petition  
for Enforcement of an Order of the National Labor  
Relations Board**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD**

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**JURISDICTION**

This case is before the Court upon the petition of the Signal Oil and Gas Company (hereinafter petitioner or Company), to review and set aside an order of the National Labor Relations Board issued against petitioner on August 24, 1966, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). In its answer, the Board has cross-petition-

ed for enforcement of its order. The Board's Decision and Order (R. 11-25, 30-31)<sup>1</sup> are reported at 160 NLRB No. 51. This Court has jurisdiction over the proceeding under Section 10(e) and (f) of the Act, the unfair labor practices having occurred at Bakersfield, California, where the Company operates a petroleum refinery.

## COUNTERSTATEMENT OF THE CASE

### I. The Board's Findings of Fact

The Board found that petitioner discriminatorily discharged employee Louis Evans, in violation of Section 8(a)(3) and (1) of the Act. The facts on which the Board's findings rest are summarized below.

The refinery employees at petitioner's Bakersfield facility are represented by the Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local 1-19. In September 1965, the contract between the Oil Workers Union and the Company was about to expire, and negotiations were under way for a new agreement (R. 13; Tr. 13, 25). At that time, in addition to refinery workers, petitioner employed at Bakersfield nine truckdrivers, who delivered oil products to local retail outlets, and an unspecified number

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<sup>1</sup> References to the pleadings reproduced as "Volume I, Pleadings" are designated "R." References to the stenographic transcript of the hearing reproduced pursuant to Court Rule 10 are designated "Tr." References to the General Counsel's exhibits and to petitioner's exhibits are designated "G.C. Exh." and "P. Exh.," respectively. Whenever a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

of pipeline employees (R. 13; Tr. 12, 16, 25-26, 32, 33, 79). Neither the truckdrivers nor the pipeline employees were represented by any labor organization (R. 13; Tr. 8-10, 33).<sup>2</sup>

On September 24, 1965, employee Louis Evans, a truckdriver, was in petitioner's dispatching office at Bakersfield. In the presence of Fred Brown, the dispatcher and Evans' immediate supervisor, Evans engaged in a conversation with Walt Bright, a pipeline employee with whom he was acquainted (R. 13; Tr. 13-15, 79, 91). Bright asked Evans "what [he] thought of the refinery's voting a union strike." Evans replied, "good, good, I hope they do," but added, "It is possible that they couldn't go on strike because it would deadlock California" (R. 13; Tr. 15). Dispatcher Brown then said, "Well, if they go on strike, you will be out of work" (R. 13; Tr. 16-17). That ended the conversation (Tr. 17). Later the same day, Brown telephoned his superior, Malcomb Dawson, and told Dawson of Evans' remarks to Bright (R. 14; Tr. 78-79, 86). Dawson was manager of marketing transportation and his office was located at Company headquarters in Los Angeles (R. 12; Tr. 77-78). According to Dawson, Brown quoted Evans as having said, "I hope they do [strike], maybe it

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<sup>2</sup> Prior to 1962, however, the truckdrivers had been represented by Teamsters, Chauffeurs, Warehousemen & Helpers, Local 87. During that year, both the Teamsters and Oil Workers Unions participated in a Board conducted election for representation of the drivers, but neither won a majority (R. 13; Tr. 8-10).



will teach this cheap company something”<sup>3</sup> (R. 14; Tr. 79).

During the following week, Dawson reported the conversation between Evans and Bright, as it had been related to him by Brown, to James Rasbury, manager of petitioner’s Employment Relations Department (R. 14; 35, 71, 86-87). At the time, neither Dawson nor Rasbury discussed the possibility of any future action with respect to Evans (R. 14; 82, 87-88). However, on September 28 or 29, Rasbury and Dawson met with H. J. Stroud, the Company’s vice-president in charge of employee relations, to discuss a personnel problem unrelated to Evans (R. 14; 37, 83). When they had concluded that discussion, Rasbury asked Dawson to relate to Stroud the substance of the report about Evans (R. 14; 37, 71, 87-88). After Dawson did so, Stroud said that Evans’ “remark in and of itself is not worthy of discharge, but I would like to see what kind of employee we have on our hands” (R. 14; Tr. 38, 71). At Stroud’s request, Rasbury obtained Evans’ personnel file and reviewed Evans’ record for Stroud (R. 14-15; 38, 71).

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<sup>3</sup> Neither Brown nor Bright testified concerning Evans’ remarks on September 24. Dawson was not present when these remarks were made and his testimony therefore indicates only what he was told by Brown. The Trial Examiner noted that there was “no significant difference between the versions [of Dawson and Evans]. At the most, Dawson’s version contains a more unflattering reference to Respondent [the Company], but the main thrust of both versions is an expression of hope by Evans that Respondent might be subjected to strike action by a group of employees with whom Evans was not directly involved” (R. 15).

Stroud then decided that Evans should be discharged (R. 15; Tr. 40, 75-76). Accordingly, on September 30, 1964, when Evans reported to the dispatcher's office in Bakersfield, he was told by dispatcher Brown that he was terminated and given a termination slip prepared by Brown, which stated, "Generally an unsatisfactory employee. Poor attitude. I feel that both the Company and the employee will be better off if he is terminated" (R. 15-16; Tr. 17-18, 48; P. Exh. 3). Evans was not satisfied with this explanation, and later that day telephoned Dawson, Brown's superior, to discuss his discharge (R. 16; Tr. 19-20). Dawson explained that Brown had reported Evans' remarks concerning the strike, that there had been a discussion with higher Company officials, and that it had been decided that Evans' continued employment would not be good for the Company or Evans (R. 16; Tr. 20-22). Dawson also queried Evans about "the conversation with Bright" and asserted that when Brown had said in reference to the contemplated strike, "Well, we might lose both our jobs," Evans had replied that he did not care (R. 16; Tr. 88-89). Dawson advised Evans that "the attitude that you have is not good for you or for the Company and therefore we are letting you go" (R. 16; Tr. 88). When Evans asked whether his discharge was final, Dawson stated, "It is final, it came from upstairs. We decided in the meeting and it is final." (Tr. 89).

## II. The Board's Conclusions and Order

On the basis of the foregoing, the Board found, in agreement with the Trial Examiner, that "Evans



was discharged because he expressed himself in sympathy with, and in support of, the strike activity of his fellow employees, that by engaging in such conduct, he was engaging in activity protected by the statute, and that his discharge, therefore, was violative of both Section 8(a)(1) and (3) of the Act" (R. 20, 30). The Board's order requires petitioner to cease and desist from the unlawful conduct found, offer Evans reinstatement and backpay, and post appropriate notices (R. 23-24, 30-31).

### ARGUMENT

#### **Substantial Evidence on the Record as a Whole Supports the Board's Conclusion That Petitioner Discharged Evans in Violation of Section 8(a)(3) and (1) of the Act**

It is settled that Section 7 of the Act guarantees to employees the right, *inter alia*, "to self organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." and that employees who engage in such activity are protected against discharge or other disciplinary action by Section 8(a)(3) and (1) of the Act. *E.g.* *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, 14; *N.L.R.B. v. Jones & Laughlin Steel Co.*, 301 U.S. 1; *N.L.R.B. v. Victory Plating Works, Inc.*, 325 F. 2d 92 (C.A. 9); *San Antonio Machine & Supply Co. v. N.L.R.B.*, 363 F. 2d 633, 635, 642 (C.A. 5); *N.L.R.B. v. Fairmont Creamery, Inc.*, 143 F. 2d 668, 672 (C.A. 10), cert. denied 323 U.S. 752; *N.L.R.B. v. Osbrink*, 218 F. 2d 341, 342-343 (C.A.



9), cert. denied 349 U.S. 928; see *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17. As we show below, the record in the instant case amply supports the Board's conclusion that Evans was discharged because he expressed agreement with the refinery workers' strike and, accordingly, that the Board was warranted in concluding that the Company's discharge of Evans for engaging in this protected concerted activity was violative of the Act.

It is undisputed that shortly before the discharge of Evans, officials of petitioner learned of a conversation between Evans and employee Bright, in which Evans said that he approved of the strike vote taken by the refinery workers at petitioner's plant and hoped that a strike against the Company would occur (p. 3, *supra*). That petitioner attached importance to Evans' remarks and did not regard the incident as casual is shown not only by the "process of escalation" (R. 19) in which the report of these remarks was conveyed from one supervisory level to the next, but also by the reaction of the senior Company official who finally made the decision to fire Evans. Thus, Brown, a dispatcher and Evans' immediate superior, reported the conversation to Dawson, manager of marketing transportation. Dawson, in turn, relayed the report to Rasbury, manager of the employment relations department. Rasbury then brought the matter to the attention of Stroud, vice-president in charge of employee relations who, upon hearing it, said he "would like to see what kind of employee we have on our hands" (p. 4, *supra*). The decision to discharge Evans was made shortly thereafter. Evans had been

employed by petitioner for nine years (R. 13; Tr. 11), and there is no evidence that the Company was planning to terminate him before it learned of his conversation with Bright (R. 15).

A reasonable inference from these facts, and particularly the juxtaposition of events, is that Evans was fired because of his remarks, and that he would not have been discharged had he remained silent. Cf. *N.L.R.B. v. Tonkin*, 352 F. 2d 509, 511 (C.A. 9); see *N.L.R.B. v. Putnam Tool Co.*, 290 F. 2d 663, 665 (C.A. 6). Petitioner, however, insists that the remarks merely resulted in an inquiry into Evans' suitability as an employee, and that this inquiry revealed information furnishing grounds for discharge. Yet all that the Company did by way of inquiry was to examine Evans' personnel file and thus review the same matters which apparently had not been sufficient to cause the Company to discharge Evans up to that time. The only additional information concerning Evans considered by the Company at this point was Evans' recently expressed attitude towards the concerted activities of his fellow employees. Accordingly, the Board could reasonably reject petitioner's explanation that Evans was discharged on the basis of his record, and could conclude instead that the true moving cause for Evans' termination was that he openly voiced his opinion in favor of the proposed strike against the Company. Cf. *N.L.R.B. v. Mrak Coal Co.*, 322 F. 2d 311 (C.A. 9); *N.L.R.B. v. Texas Independent Oil Co.*, 232 F. 2d 447, 450 (C.A. 9).<sup>4</sup>

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<sup>4</sup> Petitioner suggests (Br. p. 5) that "lack of work" was "an additional fact . . . which entered into the decision to



Nor can petitioner justify its action by asserting that good cause for Evans' discharge existed. The issue in this case is not whether there were adequate grounds for discharge, but rather whether these grounds were, in fact, the real reason for discharge. *Wonder State Manufacturing Co. v. N.L.R.B.*, 331 F. 2d 737, 738 (C.A. 6); *N.L.R.B. v. Symons Mfg. Co.*, 328 F. 2d 835, 837 (C.A. 7). Indeed, as the Second Circuit has held, "even though the discharges may have been based on other reasons as well, if the employer was partly motivated by union activity, the discharges . . . [were] violative of the Act." *N.L.R.B. v. Great Eastern Lithographic Corp.*, 309 F. 2d 352, 355 (C.A. 2), cert. denied 373 U.S. 950. To be sure there are instances where an employer asserts and establishes the existence of non-discriminatory reasons for an employee's discharge which are sufficiently compelling to render unreasonable any inference of unlawful motivation based on the other evidence in the record. Compare *Magnolia Petroleum Co. v. N.L.R.B.*, 200 F. 2d 148 (C.A. 5) with *Frosty Morn Meats, Inc. v. N.L.R.B.*, 296 F. 2d 617, 620-621 (C.A. 5). That, however, was not the situation in the instant case, as can be seen by analyzing the specific reasons assigned by petitioner for Evans' discharge. Thus, petitioner stated that, based on the observation of an unnamed employee, Evans was suspected of taking Company

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discharge [Evans]." As the Board found, however, there was "no showing . . . that [petitioner] was actively considering termination of any of the drivers at that time as a result of slack work" (R. 15).



gasoline for his own use. No further particulars were given by petitioner, and personnel manager Rasbury candidly admitted that the Company's investigation into this matter "was not conclusive" (Tr. 38). Petitioner also alleged that it had "pretty good evidence" at the time Evans was fired that he had filed a "fraudulent" claim under the Company's group health insurance plan for payment of his wife's medical expenses (Tr. 38-39). In fact, the claim for Mrs. Evans' expenses had been received in June 1965, but petitioner did not bother to check the accuracy of the statements thereon until November 1965, after Evans had been terminated (Tr. 44-45; 53; P. Exh. 2-b). Thus, as Rasbury acknowledged at the hearing, petitioner did not really know whether Evans' claim was improper when it discharged him in the latter part of September 1965 (Tr. 58).<sup>5</sup> Significantly, nothing was said to Evans by Company officials at the time of his discharge about the alleged theft of gasoline or the insurance claim. Evans was told only that he was "generally an unsatisfactory employee" and that his "attitude" was poor. The basis for the latter, as testified to by personnel manager Rasbury, was that "we had numerous complaints . . . [that Evans] . . . was a constant griper, complainer" (Tr. 38). Yet, since

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<sup>5</sup> The somewhat different issue of whether Evans, in fact, filed a claim he knew to be false was not fully litigated at the hearing in this case, and therefore the Trial Examiner correctly limited himself to a finding, plainly supported by the evidence in the record, that the file reviewed by petitioner *at the time of Evans' discharge* "did not conclusively establish Evans' responsibility . . . for the fraudulent character of the claim" (R. 14-15).

Rasbury also described these complaints as “vague, generalities” and specified few details concerning them (Tr. 38), the Company could hardly have attached particular importance to them. Apparently what was of greater concern to the Company with respect to Evans’ attitude were the views he expressed during his conversation with Bright and supervisor Brown. Indeed, that conversation was the only specific incident referred to by Dawson in response to Evans’ questions about the reasons for his discharge (p. 5, *supra*).

As the foregoing indicates, the reasons assigned by petitioner for Evans’ discharge are scarcely compelling. And since, as we have shown, there was other persuasive evidence in the record from which the Board could reasonably infer that Evans’ remarks to Bright were the actual moving cause of his discharge, the Board’s conclusion is entitled to affirmance by the Court.<sup>6</sup>

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<sup>6</sup> Petitioner would read the Board’s decision as holding that Evans’ discharge was unlawful solely because Evans’ statement concerning the proposed strike prompted Company officials to investigate and evaluate his desirability as an employee. Thus, petitioner complains that the Board erred by ignoring the actual reasons for Evans’ discharge as allegedly developed by the Company’s inquiry. In fact, however, the Trial Examiner specifically stated in his decision:

Accordingly, I find that Evans was discharged because he expressed himself as in sympathy with, and in support of, the strike activity of his fellow employees . . . (R. 19-20)

While it is true that in arriving at this finding, the Examiner pointed out the cause and effect relationship between Evans’ comment and petitioner’s subsequent investigation of



Petitioner further urges that even if it did discharge Evans because of his remarks to Bright, Evans' statements did not "look toward group action," and hence were not protected by the Act. In the event, however, that the refinery workers struck against petitioner, as they had voted to do, unrepresented employees such as Evans and Bright were likely to be asked to participate in group action with the strikers by refusing to cross picket lines, perhaps even by joining the picket lines, and by providing such moral and material support to their co-workers as they were able. Assistance of this sort would be activity clearly protected by Section 7 of the Act. *N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902, 905 (C.A. 9); *N.L.R.B. v. City Yellow Cab Co.*, 344 F. 2d 575, 582 (C.A. 6); *Truckdrivers Union Local No. 413 v. N.L.R.B.*, 334 F. 2d 539, 542-543 (C.A. D.C.); cert. denied 379 U.S. 916; *N.L.R.B. v. Rockaway News Supply Co.*, 197 F. 2d 111, 113 (C.A. 2), aff'd on other grounds 345 U.S. 71. As the Trial Examiner reasoned (R. 19):

Although the remark on its face, is somewhat mild in nature, I can only regard it as an expres-

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Evans' record, nowhere in his decision did the Examiner suggest that the reasons offered by the Company were indeed the real motive for Evans' discharge. On the contrary, the Examiner, in effect, used the connection between Evans' remarks and the investigation to emphasize the strong probability that an employer who combs through an employee's record as a result of learning that the employee is sympathetic towards union activity is merely looking for a suitable pretext to discharge that employee.



sion of sympathy and support by Evans for a group of his fellow employees who had announced that they might undertake collective action in support of demands they are making against their employer. In effect, Evans expressed common cause with the refinery employees in furtherance of their strike, even though he was not a part of the refinery group, and even though the strike would have the undoubted effect of putting him out of work. In one sense, the remark may not be a call to concerted action, but it does express support by Evans of such action by his fellow employees in another unit. Striking employees seek all the support they can get. When fellow employees not directly involved in the strike, but affected by it, express support, they often do so in the hope of reciprocal support at a later time. Thus, Evans' remark may be regarded as an expression of support for the proposed union activity of his fellow employees, made in anticipation that he or his group might receive similar support should the occasion arise. I find this to be a form of protected activity for his own aid and protection, as well as an expression of support for a labor organization of his fellow employees.

Accord: *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 505-506 (C.A. 2 per L. Hand, J.)

Moreover, the test under the Act of whether a discharge is unlawful is not whether the discharged employee actually contemplates participating in or is a participant in union activity, as petitioner seems to suggest. *Salt River Valley Water Ass'n v. N.L.R.B.*, 206 F. 2d 325 (C.A. 9); see *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9. Rather it is whether the

employer's conduct under the circumstances reasonably tends "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" (Section 8(a)(1)), or constitutes "discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization" (Section 8(a)(3)). When an employer fires or refuses to hire an individual because he believes that individual is sympathetic to unions in general or has expressed support for the activities of a particular union, as Evans did here, other employees, as well as the employee discriminated against, will be discouraged from joining a union and otherwise restrained in the exercise of their Section 7 rights. Indeed, this Court long ago recognized that "a discharge of a non-union employee because of . . . a belief that he was sympathetic to . . . a union violates Section 8(a)(1) and (3) . . ." *N.L.R.B. v. J.G. Boswell Co.*, 136 F. 2d 585, 594-596 (C.A. 9). It is immaterial that the union activity which aroused the discharged employee's sympathy or support "extends outside his own employment . . ." <sup>7</sup> *Ibid.* Nor is it necessary to establish through independent evidence that the discharge discouraged membership in a labor organization or that the employer intended it to do so. For discrimination against an employee believed to be sympathetic towards union activity necessarily has that result and is *ipso facto* a violation of Section 8(a)(3). *Ibid.*

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<sup>7</sup> See *Houston Insulation Contractors v. N.L.R.B.*, 386 U.S. 664, 668, 669; *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 505 (C.A. 2); *Fort Wayne Corrugated Paper Co. v. N.L.R.B.*, 111 F. 2d 869, 873-874 (C.A. 7).



In the instant case, the discharge of Evans for merely stating that he favored the proposed strike would inevitably operate as a deterrent to petitioner's unrepresented employees who might otherwise be willing to assist the strikers. Furthermore, inasmuch as the Oil Workers Union had previously tried without success to become the bargaining agent for petitioner's truckdrivers (p. 3 n. 2, *supra*), it is not unreasonable to assume that another such attempt would be made to recruit the drivers. The example of Evans—a truckdriver fired by petitioner for speaking out in support of the Oil Workers—would be likely to cause reluctance on the part of the other drivers to join this Union and would generally have a chilling effect on any organizational efforts among petitioner's non-union employees.

Petitioner (Br. 12-13) seeks to analogize this case to such cases as *Mushroom Transportation Co., Inc. v. N.L.R.B.*, 330 F. 2d 683 (C.A. 3); *N.L.R.B. v. Texas Natural Gasoline Corp.*, 253 F. 2d 322 (C.A. 5), *Continental Manufacturing Co.*, 155 NLRB 255, and *General Electric Co.*, 155 NLRB 208. The analogy is inapposite. In each of those cases, the conduct for which the employee was discharged did not occur in a context of protected concerted activity, whereas here, Evans' expression of approval of the strike vote of his fellow employees pointedly referred to concerted activity already under way, and thus clearly bore "some relation to group action in the interest of the employees." *Mushroom Transportation Co.*, *supra*, 330 F. 2d at 685. Even if Evans was not then directly associated with such activity, it would



be an incongruous application of the Act to hold that an employee cannot be lawfully discharged for participating in concerted activity, yet that he may be discharged for expressing approval of the concerted activities of his co-workers. As a practical matter, it can hardly be expected that employees will appreciate the subtlety of such a distinction, and will not be intimidated when one of their number is fired, as Evans was here.

In sum, we submit that the record fully warrants the Board in concluding that Evans was discharged because of his protected concerted activities and that a discharge in such circumstances violates Section 8 (a) (3) and (1) of the Act.<sup>8</sup>

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<sup>8</sup> Assuming *arguendo* that Evans' discharge would not violate Section 8(a) (3) of the Act, there is still a violation of Section 8(a) (1) here. For, as we have shown, Evans' remark must be considered a form of activity for "other mutual aid or protection" within the meaning of Section 7 of the Act. Thus, even if it could be said that Evans' discharge as a result of his remark to Bright would not tend to discourage membership in a labor organization in violation of Section 8(a) (3), it still constitutes interference, restraint and coercion of employee activity protected by Section 7 and thereby violates Section 8(a) (1) of the Act. *Pacific Electricord Co. v. N.L.R.B.*, 361 F. 2d 310 (C.A. 9).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue denying the petition to review and enforcing the Board's order in full.

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October 1967.

## CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18, 19 and 39 of this Court and in his opinion the tendered brief conforms to all requirements.

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MARCEL MALLET-PREVOST  
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*National Labor Relations Board*

## APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 *et seq.*) are as follows:

## RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

## UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \* \*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this



Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

\* \* \* \*



**In the United States Court of Appeals  
for the Ninth Circuit**

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**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

*v.*

**EVEREST & JENNINGS, INC., RESPONDENT**

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**On Petition for Enforcement of an Order of the  
National Labor Relations Board**

---

**BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD**

---

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**FILED**

**MAY 20 1957**

**WM. B. LUCK, CLERK**

**JUN 2 1957**





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**In the United States Court of Appeals  
for the Ninth Circuit**

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No. 21,746

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

EVEREST & JENNINGS, INC., RESPONDENT

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**On Petition for Enforcement of an Order of the  
National Labor Relations Board**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD**

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**JURISDICTION**

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),<sup>1</sup> for enforcement of its order (R. 45-46,

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<sup>1</sup> Pertinent provisions of the Act are set forth in Appendix A, *infra*, pp. 26-27.



60-61),” issued against respondent on May 26, 1966. The Board’s decision and order are reported at 158 NLRB No. 113. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Los Angeles, California, where respondent is engaged in the manufacture of wheelchairs. No jurisdictional issue is presented.

## STATEMENT OF THE CASE

### I. The Board’s Findings of Fact

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by threatening its employees with economic reprisals should the Union<sup>3</sup> win the election, by encouraging the filing of accusatory affidavits against union supporters, by issuing warning notices pursuant to these affidavits, and by granting employee Werner Woelke more advantageous seniority rights to encourage him to oppose the Union. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by the lay-off of employee Fred Davis and the discharge of employee Truesdell Brown because of their support of

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<sup>2</sup> References to the pleadings, decision and order of the Board, and other papers reproduced as “Volume I, Pleadings,” are designated “R.” References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated “Tr.” References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. References designated “R. Exh.” and “G.C.Exh.” are to exhibits of respondent and the General Counsel.

<sup>3</sup> International Association of Machinists and Aerospace Workers, AFL-CIO.

the Union. The evidence upon which the Board based its findings is summarized below.

### A. Background

In early 1965,<sup>4</sup> the Union began its organizing campaign at the Company's plant (R. 32; Tr. 17-18). In response to this drive, respondent distributed a letter, dated February 12, which described the "profound effects" unionization would have on the Company and on its employees (R. 32; R. Exh. 9). In this letter, respondent's president, Gerald Jennings, stated, *inter alia*, that the Union was "up to its usual tricks of making 'pie-in-the-sky' promises," that any threats made by union supporters should be reported to management so that "prompt action" could be taken against the guilty employees, and that the employees were free to join or oppose the Union and "to speak out in favor of the direct above-board relationship we have enjoyed in the past." (*Ibid.*).

On this same date, February 12, President Jennings distributed another communication to the employees informing them that the Company "has been advised" that certain employees were conducting union activities during working hours and leaving their work area for "purposes unrelated to their work" (R. 33; R. Exh. 23). Jennings' letter stated that he, personally, would guarantee that no employee will lose his job or be otherwise penalized if he decided not to join the Union or to have the Union represent him and that "any employee found guilty of spread-

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<sup>4</sup> All dates are 1965 unless otherwise stated.



ing false rumors to the contrary will be subject to severe discipline” (*ibid.*). The letter concluded by referring the employees to the rules set forth in the Company Handbook concerning “Starting . . . false or malicious gossip or rumors regarding [the Company] . . . Unauthorized absence from assigned place of work . . . Visiting during working hours, or going into other Departments except in the line of duty. . .” (*ibid.*).

**B. *The Company’s coercive antiunion campaign; the discriminatory layoff of employee Fred Davis***

On February 12, shortly before distribution of the Company’s letters to its employees, employee Mary Cornelius went to the office of Vice-President Fred Callahan (R. 34; Tr. 294). There, in the presence of Callahan, President Jennings, and labor consultant Lyman Powell, the employee stated that the Union “was going strong” in the plant and that employee Fred Davis had been “pushing union” during working hours<sup>5</sup> (R. 34; Tr. 322-324, 380-381). When Cornelius asked what she should do about this situation, Powell informed her that she could submit a sworn statement as to what had occurred and then the Company could discipline the persons involved (R. 34; Tr. 323-324). Cornelius then left Callahan’s office and returned to her work area. There she told

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<sup>5</sup> According to Cornelius’ testimony, on February 11 or 12, while she and Davis were returning to their work stations from a warehouse where their duties had taken them, Davis asked her if she wanted to sign a union card. Cornelius replied that she did not want to do so and the conversation ended (R. 34; Tr. 386).



two other employees, Geraldine Weems and Myrtle Miller, that if Fred Davis had bothered them they had a right to sign a sworn statement to that effect and submit it to the Company (R. 34; Tr. 382). That same day, Cornelius, Weems and Myrtle filed affidavits, notarized by the company's notary public, stating that Davis had solicited their union membership during working hours (R. 34-35; G.C. Exh. 16, 17, 18).

Upon the filing of these affidavits, Callahan consulted with Superintendent Ray Jenkins. The two officials, reasoning that Davis had been reprimanded during the Union's campaign a year earlier for soliciting on company time, decided to suspend Davis without pay for a period of three days (R. 35; Tr. 303, 326). That afternoon, on February 12, Davis was summoned to Jenkins' office where he was charged with "harassing employees during their working hours" and told of his three-day layoff (R. 35; Tr. 94-95). When Davis denied the charge against him, Jenkins stated that he had three affidavits from employees which supported the contention. Jenkins, however, refused Davis' request that these affidavits be produced (R. 35; Tr. 95-96).

That same afternoon, February 12, several other employees executed affidavits which also alleged that certain fellow employees had engaged in union solicitation during working hours (R. 36; Tr. 324-325). Upon receipt of these affidavits, the Company immediately issued "warning notices" to all of the accused employees. These notices admonished the employee for his "harassment" of other employees and

stated that "further such action by you will subject you to disciplinary action and possible discharge" (R. 36; G.C. Exh. 8). In a few instances the warning notices were withdrawn after an accused employee protested his innocence and an investigation, conducted by Vice President Callahan, showed that he had not in fact solicited for the Union during company time (R. 36; Tr. 302). In cases involving only the word of the accused employee against his accuser, the warning notices were not rescinded. At no time was an accused employee told the name of the employee who had submitted the affidavit against him (*ibid.*).

As noted above, employee Davis was given a three-day layoff as a result of the affidavits filed against him. When he returned to work on February 18, Davis was approached by Superintendent Ray Jenkins. Jenkins told the employee that a union was not needed in the plant and he offered to bet Davis \$5.00 that the Union would lose the election. Davis accepted this bet (R. 35; Tr. 96, 450). One week later, on February 24, Foreman James Bredehoft talked to Davis for about an hour and a half concerning the need for a union at the plant. Bredehoft told the employee that other plants had closed down because they became unionized and that the same thing could happen at the Company's plant if the Union won the election (R. 35; Tr. 96-97). Davis then asserted that the Company was showing favoritism when it disciplined him for allegedly soliciting for the Union on company time, but at the same time allowing other employees to campaign against it on company time.



Bredehoft replied that these other employees were "for the company" (R. 35; Tr. 97).

On February 25, Bredehoft engaged employee Werner Woelke in a conversation concerning the Union (R. 38; Tr. 161). Woelke had joined the Union during its organizing campaign and wore a union button to work (*ibid.*). On this occasion, Bredehoft told Woelke that a union was not needed in the plant and that there would be "no good relations" if the Union succeeded (*ibid.*). Woelke then told Bredehoft that he thought that he had been mistreated by the Company in the determination of his seniority rights<sup>6</sup> (R. 38; Tr. 162). Bredehoft asked the employee if he would like to see President Jennings about this situation and Woelke replied that he would (R. 38; Tr. 162). A meeting was then arranged for later that day (*ibid.*). As Woelke and Bredehoft were on their way to this meeting, Bredehoft suggested that Woelke remove the union button which he was wearing; the employee did so (R. 38; Tr. 162-163). At the meeting, attended by management officials Jennings, Callahan, Bruce Blickensderfer, and attorney Powell, Woelke stated his complaint concerning his loss of seniority. Upon the advice of Powell, the Com-

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<sup>6</sup> Woelke had been discharged in February 1964, for engaging in a fight with another employee. A few days after his discharge, however, he was rehired. In June 1964, Woelke learned that his vacation rights were being calculated without credit for the time he had worked before his discharge. Although Woelke protested to the Company about this situation, he was unable to get his seniority restored (R. 38; Tr. 162, 491-493, G.C.Exh. 14).



pany thereupon informed Woelke that his seniority rights were being restored (R. 38; Tr. 163, 495).

On February 26, employee Frank Medina was approached by his supervisor, Edward Gibola, while in the carpenter shop (R. 38; Tr. 141). Gibola told the employee that he did not want a union in the plant and that if the plant did become unionized Medina would lose about 85 cents in fringe benefits. Gibola then stated that the Company could discontinue the employees' Christmas bonus and do away with its annual spring dinner and Christmas breakfast (R. 38; Tr. 142-143). When Gibola added that Medina was free to make his own choice in this respect, Medina told him that he was going to vote against the Union (R. 38; Tr. 142).

*C. The discriminatory discharge of employee  
Truesdell Brown*

Truesdell Brown had been employed by the Company since May 1963, as a punch press operator in the machine shop (R. 36; Tr. 178). On February 15, 1965, Superintendent Robert Godfrey came to Brown's supervisor, William Hester, with a "warning notice" to be issued to Brown<sup>7</sup> (R. 36; Tr. 518). When Hester served the notice on Brown, the employee denied that he was guilty of the charge. Brown, however, did agree to sign the warning slip, stating that he did not want to lose his job and have

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<sup>7</sup> These were the notices that the Company issued pursuant to the filing of affidavits of employees alleging that fellow employees were soliciting for the Union on company time. See, *supra*, pp. 5-6.

his wife and children deprived of his support (R. 37; Tr. 178-179). Brown then told Hester that he thought that Lee Melstrom, one of the two employees who signed accusatory affidavits against Brown,<sup>8</sup> could support his claim of innocence in this matter. When the two men approached Melstrom and asked him about the allegation, however, Melstrom stated that Brown had in fact solicited his support of the Union while they were on the job (R. 37; Tr. 179). At that point Brown, characterized by Hester as a "quiet" individual, angrily called Melstrom a "lying son-of-a-bitch" and the two men began to approach each other (R. 37; Tr. 180, 518-519). Hester stepped between the two employees and calmed the situation. Melstrom then stated that he had been misunderstood on this matter and that Brown had engaged him in union solicitation only during non-working hours (R. 37; Tr. 180, 520). Brown apologized to Melstrom for his actions and the men returned to work (R. 37; Tr. 180).

Hester reported this incident to Superintendent Godfrey and Vice-President Callahan. It was decided that another warning notice would be issued to Brown for his conduct earlier that day (R. 37; Tr. 521). This notice, issued because of Brown's "abusive language and threatening another employee", was given to Brown on February 16 by Hester and Godfrey (R. 37; Tr. 180, 521). Brown read the no-

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<sup>8</sup> In addition to Melstrom, employee Ervin Sinor also submitted an affidavit of this nature. Sinor's action was taken pursuant to the suggestion of his supervisor, Earl Ruffner, that he file such an affidavit (R. 37; Tr. 505).



tice and, visibly nervous and shaking, tore it up. He then accused Godfrey and Hester of "picking on him" and asserted that the Company was trying to get rid of him (R. 37; Tr. 181, 522-523, 531, 547). Godfrey replied that the Company was not "after" Brown and his union activities had nothing to do with the issuance of this reprimand (R. 37; Tr. 547-548). Brown then asked Godfrey if it would clear matters if he apologized to Melstrom for his actions and, accompanied by Hester, Brown went to Melstrom's work area. The two employees shook hands and Godfrey called everyone back to work (R. 37; Tr. 182).

Immediately after this incident, Godfrey went to Callahan and Jennings and told them what had happened (R. 37; Tr. 364). After some discussion, Jennings stated that Brown should be discharged (R. 37-38; Tr. 308, 364). Brown was then summoned to the office where Callahan informed him that he was being terminated because he had been "insubordinate" and had destroyed company property by tearing up his warning notice (R. 38; Tr. 183). Brown said that he had heard enough and left the office (R. 38; Tr. 184).

## II. The Board's Conclusions and Order

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by threatening its employees with economic reprisals if the plant were to be unionized, by granting employee Woelke greater seniority rights to encourage him to oppose the Union, by encouraging the filing of accusatory affidavits against supporters of the Union,



and by issuing warning notices pursuant to these affidavits in order to systematically harass the union supporters. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act when it laid off employee Fred Davis and discharged employee Truesdell Brown because of their activities on behalf of the Union.

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the Board's order requires the Company to offer employee Brown full reinstatement, to make Brown and employee Davis whole for any loss of earnings suffered because of the Company's discrimination against them, and to post the appropriate notices (R. 45-46, 60-61).<sup>9</sup>

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<sup>9</sup> In view of the Company's unfair labor practices during the critical preelection period, the Board adopted the Trial Examiner's recommendation that the election of March 4, 1965, be set aside. The Board accordingly directed a new election be held at such time as the Regional Director deems appropriate (R. 60-61). This action of the Board is not before the Court as it does not constitute a final order of the Board reviewable under Section 10 of the Act. *A.F.L. v. N.L.R.B.*, 308 U.S. 401, 409; *Hendrix Mfg. Co. v. N.L.R.B.*, 321 F. 2d 100, 106, n. 10 (C.A. 5); *Daniel Construction Co. v. N.L.R.B.*, 341 F. 2d 805 (C.A. 4), cert. denied, 382 U.S. 831.

## ARGUMENT

### **I. Substantial Evidence on the Record as a Whole Supports the Board's Finding That the Company Interfered With, Restrained and Coerced Its Employees in Violation of Section 8(a)(1) of the Act**

As shown in the Statement, the Company responded to the Union's organizing efforts at its plant by initiating a campaign of its own designed to stem this growing tide of unionism. In a letter, dated and distributed to the employees on February 12, the Company detailed the "profound effects" unionization would have on both the company and the employees (R. Exh. 9). In another communication, distributed that same day, the Company warned the workers against conducting union activities during working hours and leaving their work areas for "purposes unrelated to their work" (R. Exh. 23). Then by means of threats, coercive statements, granting of economic benefits, encouraging employees to file affidavits against prounion employees, and issuing warning notices pursuant to these affidavits, the Company proceeded to inhibit its employees in the full exercise of their statutory rights.

Thus, on February 24, Foreman James Bredehoft spoke with employee Fred Davis for more than an hour in an attempt to get Davis to disaffiliate from the Union. Davis, who one week earlier had been suspended from work because of his alleged union solicitation during working hours (see, *infra*, pp. 18-21), was told by Bredehoft that the plant might be forced to "close down" if the Union was successful in its organizational effort (Tr. 97). Two days later,



employee Frank Medina was approached by his supervisor, Edward Gibola. Gibola informed Medina that the Company did not want the Union and that if the plant became unionized Medina would lose about 85 cents worth of fringe benefits. Gibola then warned the employee that if the Union did succeed, the Company could discontinue its Christmas bonus, its spring dinner and its Christmas breakfast for the employees (Tr. 141-143). Such statements by supervisory personnel, coming at the height of the Union's organizing drive, represent the clearest sort of coercive conduct violative the Act.<sup>10</sup> See, *N.L.R.B. v. V. C. Britton Co.*, 352 F. 2d 797, 798 (C.A. 9); *N.L.R.B. v. Action Wholesale Co.*, 342 F. 2d 798 (C.A. 9), enf'g, 145 NLRB 627, 633-634; *N.L.R.B. v. Kit Mfg. Co.*, 292 F. 2d 686, 688 (C.A. 9); *N.L.R.B. v. Parma Water Lifter Co.*, 211 F. 2d 258, 261-262 (C.A. 9); *N.L.R.B. v. Sebastopol Apple Growers Union*, 269 F. 2d 705, 707-708 (C.A. 9).

At this same time, on February 25, Foreman Bredehoft spoke to employee Werner Woelke, an

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<sup>10</sup> Although Bredehoft and Gibola both testified that they did not make the threats attributed to them, the Trial Examiner discredited their denials. The Board adopted these findings (R. 40-41, 59-60). It is well settled that the resolution of conflicting testimony is the responsibility of the Trial Examiner and the Board and that their determinations ordinarily will not be disturbed by a reviewing court. *N.L.R.B. v. Local 776, I.A.T.S.E.*, 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *N.L.R.B. v. Radcliffe*, 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B. v. Anderson*, 206 F. 2d 409 (C.A. 9), cert. denied, 346 U.S. 938. We submit that the Trial Examiner's credibility resolutions, adopted by the Board, are entitled to affirmance here.



avowed union supporter, in an attempt to cause his defection from the Union. Bredehoft told the employee that a union was not needed in the plant and if the plant should be organized, it would bring about "no good relations" amongst the employees (Tr. 161). Woelke, however, expressed the view that he had been mistreated by the Company and that he was still dissatisfied about respondent's disposition of his dispute concerning certain of his seniority rights. In Woelke's case, the employee had been denied credit by respondent for his employment time preceding the date of his discharge in February 1964, even though he had been reemployed just a few days later. Although his earlier protest had been fruitless, on this occasion Bredehoft asked Woelke if he would like to see President Jennings about the matter and, that same day, arranged for a meeting between the two men. On their way to this meeting, however, Bredehoft suggested to Woelke that he remove the union button which he was wearing and the employee did so. At the meeting, Woelke stated his complaint to the management officials and was then told that his seniority was being restored.

It is clear that the restoration of Woelke's seniority rights was motivated by the Company's desire to cause his disaffiliation from the Union. Prior to the Union's organizing campaign at the plant, Woelke had tried unsuccessfully to reacquire these rights (Tr. 491). It was only after he based his preference for the Union on the fact that he had been "mistreated" as to his seniority, that he was granted this benefit. Even then, he was advised by Bredehoft to

remove his union button before seeing the management officials because "it looked better" (Tr. 163). The granting of this economic benefit to Woelke, in an obvious attempt to persuade him to reject the Union, falls plainly within the ambit of Section 8(a)(1) of the Act. *N.L.R.B. v. Kit Mfg. Co.*, *supra*, 292 F. 2d at 288; *N.L.R.B. v. Laars Engineers, Inc.*, 332 F. 2d 664, 666-667 (C.A. 9); and see, *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 684; *N.L.R.B. v. Parma Water Lifter Co.*, *supra*, 211 F. 2d at 261-262.

To complement these blatant acts of interference, restraint and coercion, the Company proceeded to harass its prounion employees by issuing warning notices to them based on their alleged violation of a rule prohibiting solicitation for the Union during working hours, immediately after announcing a new and more restrictive rule. While the enactment and enforcement of work rules is normally wholly within management's control, if such rules are put into effect to undermine the union activities of its employees—and disciplinary action is taken pursuant to the rule—it is proscribed conduct under Section 8(a)(1) of the Act. See, *Revere Camera Co. v. N.L.R.B.*, 304 F. 2d 162, 164 (C.A. 7); *Sabine Vending Co.*, 147 NLRB 1010, *enf'd*, 355 F. 2d 932 (C.A. 5). As the Fourth Circuit has stated (*N.L.R.B. v. Lester Bros., Inc.*, 301 F. 2d 62, 67):

. . . the sudden enforcement of the rules, reasonable in themselves, at the height of union organizational efforts, constituted an unfair labor practice, particularly when combined with the



threat of *dismissal* for infringement of rules, the violation of which normally . . . would not violate plant security, or otherwise seriously affect the plant's operations.

These notices, warning of "disciplinary action and possible discharge" if the activity continued, were issued after the Company had openly encouraged the filing of accusatory affidavits by antiunion employees. Yet, it is settled law that an employer's instigation, participation and encouragement of union repudiating activities on the part of its employees is violative of Section 8(a)(1) of the Act. *N.L.R.B. v. Howard Cooper Corp.*, 259 F. 2d 558, 559-560 (C.A. 9), and cases cited therein; *N.L.R.B. v. Birmingham Publishing Co.*, 262 F. 2d 2, 7 (C.A. 5); *Edward Fields, Inc. v. N.L.R.B.*, 325 F. 2d 754, 759-760 (C.A. 2); *N.L.R.B. v. Mid-West Towel & Linen Service*, 339 F. 2d 958, 960-961 (C.A. 7); *N.L.R.B. v. Scherer & Sons, Inc.*, 370 F. 2d 12, 13 (C.A. 5), enf'g *per curiam*, 147 NLRB 1442, as modified. "The dominant purpose [of the Act] is the right of employees to organize for mutual aid without employer interference." *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 798; *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409.

The Board's finding that the Company unlawfully promoted and encouraged the filing of affidavits against employees who had allegedly solicited for the Union on company time is amply supported by the record. Thus, on February 12, Supervisor Earl Ruffner approached employee Ervin Sinor at his work



area and "asked" the employee to sign an affidavit embodying his previously expressed complaint that other employees had solicited his union membership (Tr. 505-506). Sinor was told to go to the office of the Company's notary public, Elizabeth Janes. There, with Janes supplying him with the full names of the accused employees, Sinor signed an affidavit. On this same day, employee Mary Cornelius was told by Lyman Powell, the Company's attorney, that she could file an accusatory affidavit and "the company would notarize it for her" (Tr. 324). She also took advantage of this service and submitted her notarized affidavit to the management. As Vice-President Callahan conceded, before this time "it was not the general rule at the plant for . . . one employee to file an affidavit against another employee" (Tr. 323). With Cornelius spreading the word throughout the plant, some 20 of these notarized affidavits were filed by employees accusing others of soliciting for the Union.

Clearly, the whole procedure had the earmarks of a management sponsored program which the employees would hesitate to oppose for fear of incurring management's displeasure. For once it received the affidavits, the Company proceeded to issue warning notices, containing threats of discharge, to the accused employees. The truth of these affidavits was not questioned by any management official. Only if the accused employee protested his innocence was an investigation conducted and then only if the employee was clearly free of guilt was his warning notice withdrawn. In cases involving only the word of the accused employee against that of his accuser, the warn-

ings remained in effect, although the Company had recognized in the other cases that its encouragement had produced false accusations. In no case was the employee notified of the name of the person accusing him of the prohibited solicitation. With the threat of discharge or other disciplinary action now hanging over the head of each union supporter, these affidavits and notices became the most effective weapons in the Company's arsenal of coercive antiunion tactics. For, as shown below, these devices were immediately seized upon by the Company to effectuate the layoff of employee Davis and the discharge of employee Brown, both known union activists.

**II. Substantial Evidence on the Record as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(3) and (1) of the Act When It Laid Off Employee Fred Davis and Discharged Employee Truesdell Brown Because of Their Activities on Behalf of the Union**

***A. The layoff of employee Davis***

The Board's finding that the Company laid off employee Davis because of his union activities has substantial support in the record. Davis was one of the leading union activists in the plant, during both this union campaign and a similar organizational drive one year earlier. Concededly, respondent was well aware of Davis' activities on behalf of the Union during these periods. When, on February 12, it received affidavits from three antiunion employees stating that Davis had solicited their union membership during working hours, the Company, without any concern as



to the validity of these charges, decided to suspend Davis for a three-day period. The layoff took effect immediately thereafter.

The Company's anxiety to punish this union adherent during the height of the Union's organizing effort is apparent from the manner in which Davis' layoff was effectuated. When confronted by Superintendent Jenkins with the accusation that he had been "harassing employees during their working hours", Davis denied that he had been guilty of such a charge (Tr. 95). Jenkins then referred to the three accusatory affidavits—signed by employees Cornelius, Weems, and Miller—but refused Davis' request that they be produced (Tr. 96). Davis asked that he be told the names of his accusers, but again Jenkins refused to give him this information (Tr. 449). Moreover, the record shows that no investigation was conducted by any management official as to the truth of the affidavits and at no time were any of the three employees questioned concerning the full facts of the alleged solicitation. While their affidavits stated that Davis had solicited their membership "numerous times" during working hours, their testimony reveals only single instances of such solicitation, all taking place before the Company's newly imposed strict prohibition against such solicitation.<sup>11</sup> Thus, Cornelius

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<sup>11</sup> As shown above, prior to the Company's letter to its employees on February 12, there existed no specific rule against union solicitation during working hours. While there is testimony showing that employees knew of a prior restriction on union solicitation during working hours, it is evident that such a restriction was imposed only during a union



testified that the “only time” during this campaign that Davis approached her was on the morning of February 11 or 12 (Tr. 386-387); Weems testified that “the only time” Davis talked to her about the Union at this time was on February 10, when during an argument that she was having with a supervisor, Davis told her that if she signed a union card she would not “have to take that guff” (Tr. 412-413, 409).<sup>12</sup> Miller was not called as a witness. In short, a simple investigation of the matter by the Company would have disclosed that Davis’ alleged solicitations had occurred either during the union campaign a year earlier or before the Company announced that such solicitation during the present campaign would not be tolerated. Obviously, the Company was not in-

---

organizing campaign (Tr. 102). Thus, as of February 12, only if the solicitation involved leaving one’s working area or being inattentive to his job would it be considered to have been in violation of a published plant rule. Here, even assuming that Davis did solicit during working hours, the testimony of employees Cornelius and Weems shows that it did not require Davis to be away from his work station or to ignore his own work. Coming as it did before the February 12 declaration of company policy, it cannot be maintained that Davis’ alleged solicitations were in violation of the existing rules governing such conduct (see, *supra*, pp. 15-16).

<sup>12</sup> Davis’ statement to Weems, coming as a spontaneous remark with only generalized references to the employee’s statutory rights, wholly lacked the intent which is normally found in solicitations. Thus, it is questionable whether the statement actually constituted union solicitation or was only “a simple exchange of information among employees” which have been held to be beyond the reach of company no-solicitation rules. *N.L.R.B. v. Great Atlantic & Pacific Tea Co.*, 277 F. 2d 759, 762 (C.A. 5).

terested in even so simple an explanation but was concerned only with punishing one of the Union's leading supporters. As such, the "arbitrary action [by the Company] seem[s] more consistent with antipathy for union activity than concern over plant rules." *Time-O-Matic Corp. v. N.L.R.B.*, 264 F. 2d 96, 102 (C.A. 7).

In view of the Company's coercive attempts to defeat its employees' organizational efforts, its knowledge of Davis' active participation in those efforts, and the circumstances of the layoff, we submit that the Board properly rejected respondent's explanation for the suspension and found instead that the layoff was discriminatorily motivated. *N.L.R.B. v. Sebastopol Apple Growers Union*, *supra*, 269 F. 2d at 709-710; *N.L.R.B. v. Homedale Tractor & Equipment Co.*, 211 F. 2d 309, 313-314 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B. v. Dant & Russell*, 207 F. 2d 165, 166-167 (C.A. 9); *N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902, 907 (C.A. 9).

#### ***B. The discharge of employee Brown***

Under strikingly similar circumstances, employee Truesdell Brown was discharged on February 16, the day after Davis had been discriminatorily laid off. Brown, described by Supervisor William Hester as a "very good employee" (Tr. 518), also had actively participated in the Union's organizing campaign. His activities in this respect were fully known by the Company and, as Hester testified, two weeks before his discharge several supervisors had reported that



Brown had been passing out union leaflets (*ibid.*). Again by the use of accusatory affidavits and warning notices, a pretext was soon found by respondent to effectuate the discharge of this union adherent.

Thus, on February 15, Superintendent Robert Godfrey instructed Hester to issue a warning notice to Brown based on the affidavits filed by employees Lee Melstrom and Ervin Sinor.<sup>13</sup> When Brown was given the notice he denied the charge against him and maintained that employee Melstrom would support his claim of innocence. However, when Melstrom was asked about his affidavit he stated that Brown did solicit his membership. Thereupon, Brown, whom Hester considered to be a "quiet individual", called Melstrom a "lying son-of-a-bitch" and the two employees began to approach each other (Tr. 180, 518-519). Hester stepped between them and calmed the situation, whereupon Melstrom admitted that he had been misunderstood and that Brown's solicitation had occurred outside of working hours; Brown immediately apologized to Melstrom for his actions. Despite this apology and the immediate resumption of work by the employees, the Company seized upon this incident to issue another warning notice to Brown based upon his conduct of that day. When Hester and Godfrey gave him this second notice the next day, Brown, visibly shaken by the Company's increasing attack against him, tore the notice into several pieces and accused the supervisors of trying to get rid of him.

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<sup>13</sup> As shown above, Sinor was "asked" to file the affidavit by his supervisor, Earl Ruffner (Tr. 505-506).



Then, evidently realizing the precariousness of his position as a strong union adherent in the plant, he asked if it would clear matters if he again apologized to Melstrom. When Brown and Melstrom shook hands, the men were called back to work and the incident was over. Yet, the Company now had what it was after—based on his “insubordination” and his “destroying of company property” by tearing up the warning notice (Tr. 183), Brown was summarily discharged.

In short, the record amply supports the Board’s finding that Brown’s discharge was motivated not by legitimate business reasons but because of his activities on behalf of the Union. Although Brown was considered a “very good employee”, his overt union activity during the height of the organizing campaign made him an obvious target for the Company’s anti-union responses. When issued his first warning notice, he protested his innocence and ultimately was supported in his claim by employee Melstrom. Yet the Company, now fully cognizant of Brown’s sensitivity to its concern over his union activities, issued another warning to the employee. His subsequent conduct—“insubordination” by accusing the Company officials of trying to get rid of him and “destruction of company property” by tearing up the notice—was hardly of such a nature, but for his union adherence at the time of intense union activity, to warrant the discharge of a “very good employee”. Surely, the reaction of this usually “quiet employee” to the issuance of the second notice, while not to be condoned, was a predictable result of the harassment

which Brown, as a leading unionist, was forced to endure.<sup>14</sup> It is settled law that intemperate and on-the-spot employee reaction to unlawful discrimination does not of itself negate a finding that the ensuing discharge was itself unlawful. As stated by the Fourth Circuit:

An employer cannot provoke an employee to the point where he commits such an indiscretion as is shown here and then rely on this to terminate his employment . . . The more extreme an employee's justified sense of indignation . . . the more likely its excessive expression . . .

*N.L.R.B. v. M & B Headwear Co.*, 349 F. 2d 170, 174 (C.A. 4); Accord: *N.L.R.B. v. Mrak Coal Co.*, 322 F. 2d 311 (C.A. 9); *N.L.R.B. v. A.P.W. Products Co.*, 316 F. 2d 899, 904 (C.A. 2); *N.L.R.B. v. Morrison Cafeteria Co.*, 311 F. 2d 534, 538 (C.A. 8).

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<sup>14</sup> It cannot be disputed that "the existence of some justifiable ground for discharge is no defense if it was not the motivating cause." *N.L.R.B. v. Texas Independent Oil Co., Inc.*, 232 F. 2d 447, 450 (C.A. 9); *N.L.R.B. v. Tonkin Corp.*, 352 F. 2d 509 (C.A. 9).

## CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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DOMINICK L. MANOLI,  
*Associate General Counsel,*

MARCEL MALLET-PREVOST,  
*Assistant General Counsel,*

ELLIOTT MOORE,  
RICHARD S. RODIN,  
*Attorneys,*

*National Labor Relations Board.*

June 1967.



## APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

## RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

## UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

Sec. 10 (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or

restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

## APPENDIX B

## INDEX TO REPORTER'S TRANSCRIPT

(Numbers are to pages of the reporter's transcript)  
Board Case No. 31-CA-45

## GENERAL COUNSEL'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>	<u>Rejected</u>
1 (a) -1 (dd)	4	5	5	
2	6	6	8	
3	6	6	8	
4	6	6	8	
5	6	7	8	
6	7	7	8	
7	7	7	8	
8	18	18	25	
9	25	25	26	
10	64	64	71	
11	129	129	139	
12	148	148	152	
13	157	157	159	
14	164	164	166	
15	177	177	185	
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17	332	332	404	
18	332	332	404	
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20	333	333	404	
21	333	333	405	
22	333	333	405	
23	334	334	405	
24	334	334	.....	407
25	334	334	405	



## GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence	Rejected
26	334	335	405	
27	335	335	405	
28	335	335	406	
29	335	336	406	
30	336	336	406	
31	336	336	406	
32	336	336	406	
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34	337	337	-----	407
35	337	337	-----	407
36	337	338	-----	407
37	338	338	-----	407
38	350	350	351	

## RESPONDENT'S EXHIBITS

1	190	191	191	
2	208	208	209	
3	211	211	211	
4	212	212	213	
5	221	221	221	
6	222	222	226	
7	227	227	-----	227
8	228	228	-----	229
9	230	230	231	
10	231	231	-----	232
11	233	233	235	
12	236	237	237	
13	238	238	-----	238
14	238	239	-----	239
15	239	239	-----	239
16	240	240	-----	240

## RESPONDENT'S EXHIBITS

No.	Identified	Offered	Received in Evidence	Rejected
17	240	241	.....	242
18	242	242	.....	247
19	242	243	.....	247
20	243	243	.....	247
21	244	244	.....	247
22	244	244	.....	247
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34	318	319	319	
35	319	319	320	

## CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST  
*Assistant General Counsel*  
*National Labor Relations Board*

No. 21,746

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*vs.*

EVEREST & JENNINGS, INC.,

*Respondent.*

---

On Petition for Enforcement of an Order of the  
National Labor Relations Board.

---

RESPONDENT'S BRIEF.

---

FILED

JUL 26 1967

LYMAN B. POWELL,

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Los Angeles, Calif. 90049,

*Attorney for Respondent.*

WM. B. LUCK. CLERK

JUL 31 1967





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**RESPONDENT'S BRIEF.**

---

**JURISDICTION.**

As stated in General Counsel's Brief, this Court has jurisdiction, which is conceded by Respondent.

**STATEMENT OF THE CASE.**

Everest & Jennings<sup>1</sup> is a small wheelchair manufacturer in Los Angeles, California, employing approximately 300 people. For the past four or five years, the Company has been the object of approximately one union organizing campaign a year [Tr. 209]. Prior to this case, however, no unfair labor practice charges had ever been filed against the Company.

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<sup>1</sup>Hereafter referred to as the "Company".



In early February, 1965, the International Association of Machinists<sup>2</sup> began an effort to organize the employees at the Company [R. 32; Tr. 17-18]. Considerable organizing activity soon developed in the plant, production declined [Tr. 299], and talking and union activity on company time became a serious problem [Tr. 303].

On February 12, in response to the increased Union activity, the Company president, Gerald Jennings, addressed two letters to the employees [R. 32-33]. In the first letter he stated:<sup>3</sup>

“The Machinists Union (IAM) is once again making a determined effort to sign up our employees and add their dues and initiation fees to its treasury. From information which has come to my attention, it is clear that the IAM is up to its usual tricks of making ‘pie-in-the-sky’ promises, misrepresentations as to what our employees could gain through unionization, and some of its adherents within the plant have been spreading false rumors and intimating that employees who don’t fall in line with IAM drive will suffer for it if the union succeeds.

“I have heard that some employees have been threatened by the ‘inside’ union organizers that they will be fired or lose their rights in the company unless they ‘sign up.’ This is *entirely false*, and any employee spreading such lies will be subject to severe discipline. The law protects every

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<sup>2</sup>Hereafter “Union” or “I.A.M.”

<sup>3</sup>For clarification, respondent has reproduced the full text of paragraphs in the letters of February 12 from which only excerpts were taken in the petitioner’s brief.

employee's right to *refrain* from joining unions or from taking part in union activity, just as it protects their right to join unions. If you are approached by any employee in the plant, or by outside union organizers or officials, with such threats, either expressed or implied, notify your supervisor or management immediately. We will take prompt action against the employee making such threats, or see that the NLRB prosecutes the IAM if its officials are responsible.

“In conclusion, let me assure all of my fellow employees that everyone working for Everest & Jennings is free to join or assist any labor organization, and is *likewise* free to *oppose* unions and to speak out in favor of the direct above-board relationship we have enjoyed in the past. The Company will not discriminate against employees because of their views one way or the other, and if a union should unfortunately come into this plant, we will honor our lawful obligation to bargain with it. But I want it to be clearly understood that I feel that no union is needed at this company, and that we should continue to work together in harmony on a direct and friendly basis as we have in the past. If any of you have any questions about company policy, the union campaign, or your lawful rights, feel free to contact the Personnel Department or any member of management.” [R. Ex. 9].

The second letter stated:

“Management has been advised that certain employees are conducting union activities during working hours and are leaving their work stations

at such times and going into other departments for purposes unrelated to their work. Also some of our personnel have been told by the inside union agents that they will lose their jobs or certain other rights if they do not sign a union card. Persons making such threatening statements or violating company rules will be subject to appropriate discipline or discharge.

“Management wants to assure all employees that no one need join any union to retain his job or to continue to progress in this organization, and any statements to the contrary, are absolutely false. The law protects each employee’s right to join or *not to join* labor organizations and forbids either employers or unions from interfering with the employees’ free choice.” [R. Ex. 23].

On February 19, 1965, the Company petitioned the National Labor Relations Board<sup>4</sup> for a consent election to determine whether its employees wished to be represented by the IAM [G.C. Ex. 1(a)]. On the same day, employee Truesdell Brown charged the Company with an unfair labor practice in terminating him [G.C. Ex. 1(e)]. Four days later, the IAM filed a petition for an election [G.C. Ex. 1(e)].

The following day, both parties agreed to a consent election to be held on March 5, 1965 [G.C. Ex. 1(c)]. The results of the election showed that out of 194 possible voters, 105 were against the I.A.M., 72 were for the I.A.M., 13 were challenged, one was void, and 3 votes were not cast [G.C. Ex. 1(v)].

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<sup>4</sup>Hereafter “Board” or “N.L.R.B.”



Six days later on March 10, the I.A.M. filed objections to the conduct of the election, seeking to have the results overturned [G.C. Ex. 1(s)]. One month later, on April 9, the Union filed unfair labor practice charges against the Company [G.C. Ex. 1(f)].

### A. The Undisputed Evidence.

On February 12, 1965, Mary Cornelius, an employee, asked to speak with management; pursuant to an established practice of allowing employees to confer upon request with Company officials [Tr. 295], she was given this opportunity [Tr. 295-296; 380-381]. She explained to the Company officials present that Fred Davis, another employee, had been annoying workers in the upholstery department and had been talking with other employees about the Union during working time [Tr. 295-296, 379-380]. She asked what could be done to stop Davis from bothering the employees and what she and other employees could do to oppose the Union [Tr. 296].

With respect to the Fred Davis problem, she was told that because of the probability that the I.A.M. would file charges with the Board, the Company was reluctant to take disciplinary action against employees who might be Union organizers; however, the Company would enforce its normal rules, and if an employee wished to complain against another employee concerning violations of these rules, it would have to be in writing under oath [*ibid.*]. She was told that a Company notary in the office would, as usual, be available [Tr. 297].

As to the second question raised by Mrs. Cornelius, she was informed that she had the same rights to cam-

paign against the Union as other employees had to campaign for it, but that the Company could not lend her assistance or let her use Company facilities. She was also told she would have to adhere to the same rules as the other employees by limiting such activities strictly to her own time [Tr. 296, 380-381]. She then left and went back to her department. Shortly thereafter she turned in a sworn affidavit [Tr. 389; G.C. Ex. 16].

By her own uncontradicted testimony, Mrs. Cornelius informed other employees [Tr. 382] that they could complain about the violations of Company rules that irritated them. On the afternoon of February 12, approximately 21 other employees availed themselves of this opportunity. No Company officials were present when the statements were made or notarized. These statements in the employees' own handwriting, complained, in most cases, that certain other employees were bothering them about the Union "on the job" [G.C. Exs. 22, 25, 27] or "while working on my job" [G.C. Ex. 26].

Among the affidavits submitted by employees on the afternoon of February 12 were three charging that Fred Davis was soliciting for the Union during working hours. One of these was from Mrs. Cornelius stating, "I have been asked by Fred Davis to sign a card to get the Union in Everest & Jennings during working hours at different times and Wednesday morning February 10, 1965, he explained all the advantages of a Union in this company." [R. 34]. Another was from employee Weems stating, "I have been asked numerous times by Fred Davis to sign a union card during working hours." [R. 35]. Another from employee Miller said, "I have been asked on numerous occasions by Fred



Davis to sign a union card during working hours.” [R. 35].

Upon receiving these affidavits, Vice-President Fred Callahan consulted with Ray Jenkins, superintendent of the plant where Davis worked. Recalling that in the Union campaign eleven months earlier Davis had been warned for engaging in Union activity on Company time, they decided to suspend Davis without pay for three days [R. 35]. Davis was called into Jenkins’ office with his immediate supervisor, Don Reed, and asked if he remembered receiving a warning about a year ago [Tr. 95]. When Davis indicated that he did remember being given a warning notice, he was told that on the basis of three sworn affidavits he was being laid off for three days [*ibid.*].

At the same time, Mr. Callahan met with two plant superintendents and reviewed the affidavits that had been received [Tr. 326-348]. Some affidavits were also discussed with the individual’s supervisor [Tr. 352]. Callahan then gave instructions to issue warning notices to the offending employees. These slips were prepared by the superintendents with the help of the personnel department. They were all identical [Tr. 352]. The slips were issued on the following Monday, February 15.

Upon receiving their warning slips, some of the recipients complained that they were not guilty. Others made no denial, or failed to until some time later. In all cases where complaints were raised by these individuals that they were not guilty as charged, investigations were made as to the truth of the affidavit [Tr. 358]. In a few instances, where it became apparent that the affiants had misconstrued the technicalities of



“working time”, the departmental supervisor went back and made a full apology to the employee charged and the warning slip was withdrawn from his personnel file [Tr. 302]. In other cases, the affiants adhered to their sworn statement, and in these cases, the warning slips were not withdrawn [*ibid.*].

Among those employees given warning notices on Monday, February 15, was Truesdell Brown. Upon receiving his slip, Brown denied that he was guilty of the charge. In front of his supervisor he turned on another employee, Lee Melstrom, and either called him a “lying son-of-a-bitch” [Tr. 187:159] or asked Melstrom for support of his claim of innocence, and when he didn’t receive it, then called him a “lying son-of-a-bitch” [Tr. 179-180:199]. In either event, both employees approached each other and had to be separated by the supervisor [Tr. 520]. During this altercation, Melstrom tried to explain that he had made a mistake in the affidavit and that Brown had engaged in Union solicitation after Brown had punched in, but before he began work [R. 37; Tr. 180:520]. Brown apologized to Melstrom for his actions and the men returned to work [R. 37].

Hester, the supervisor who witnessed the incident between Brown and Melstrom reported it to his superintendent, Godfrey. Vice-President Callahan was called in, and it was decided to give Truesdell Brown a reprimand<sup>5</sup> for using abusive language and threatening another employee [*ibid.*].<sup>6</sup> On the next day, Brown

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<sup>5</sup>Written warning notices of this type were established procedure in such cases. See Respondent’s Rejected Exhibits 27 through 32, and Transcript 312-315.

<sup>6</sup>Published company rules in the employee handbook expressly prohibit such conduct.

was shown the warning notice and asked to sign it.<sup>7</sup> He again began using abusive language. Finally, he took the warning slip—which he was supposed to return to his supervisor to be placed in company files—and tore it into four pieces [R. Ex. 1]. He then threw it down on his bench in front of his fellow employees and his supervisor [R. 37; Tr. 181:523].

Godfrey reported to Callahan and Jennings what had happened [R. 37; Tr. 524]. A decision was made that since Brown had been insubordinate, he should be discharged.<sup>8</sup> Hester was told to bring Brown down to Callahan's office. Arriving at Callahan's office, Brown was told that he was being discharged for insubordination or destroying company property and asked if he had anything to say. Brown answered, "I have heard enough of this shit for one day," and then he left [R. 38; Tr. 184].

On February 24, 1965, assembly department foreman James Bredehoft went into the woodworking department and had a conversation with Fred Davis. In this conversation, they discussed the effects of unionization on the Company [R. 35-36; Tr. 96-97].

On February 25, Bredehoft was involved in a discussion with employee Werner Woelke.<sup>9</sup> In this con-

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<sup>7</sup>Signing a warning slip did not constitute an admission of guilt, but merely acknowledged receipt [Tr. 19:22; 24:10-13, 17; 526:10-17].

<sup>8</sup>After a full hearing, the State of California Department of Labor held that Brown's discharge was "for cause" and denied him unemployment compensation.

<sup>9</sup>This conversation and the later adjustment of Woelke's grievance were not alleged in the complaint, and were admitted into the record over Respondent's repeated objections. The Board ignored Respondent's Exception 10 concerning this denial of due process.



versation the question of Woelke's seniority rights came up, and Woelke complained that the Company had treated him unfairly by not giving him back his seniority after he had been discharged for fighting and then hired back. Bredehoft arranged a meeting for Woelke with the Company president to discuss the matter. In this meeting, upon the advice of the Company's labor consultant, Woelke's seniority was given back to him [R. 38; Tr. 162-164:185-487].

At some time before the election, employee Frank Medina had a conversation with his supervisor, Edward Gibola. Gibola told Medina that he did not want a union in the plant, but that Medina was free to make his own choice [R. 38; Tr. 142:467].

## **B. The Conflicting Testimony.**

The circumstances surrounding many of the above events were the subject of sharply conflicting testimony.

### **1. The Discharge of Truesdell Brown.**

On February 15, when Brown received a warning slip similar to others given out on that date, he testified that when he read it he looked up and saw another employee and that he said, "Lee, have you seen me do any company (sic) business after I have punched in?" [Tr. 179], or that he looked up and said, "Hey, Melstrom, for crying out loud, here is what I am accused of," [Tr. 198].

However, Bill Hester, Brown's supervisor testified to the following [Tr. 519]:

"Q. I wonder if you would take your time and tell us what happens (sic) when you gave the warning slips to Truesdell Brown? A. Well,



I approached him at his work station, at his punch press.

His back was to me when I approached him.

I called his name and said, 'Tony, I have a warning slip for you to read and sign.'

He turned around and took the slip and started to read and then he raised his hands up and said, 'That lying son-of-a-bitch.'

He turned around towards Lee Melstrom, who was about thirty feet away coming towards us, and he said, 'Come here, you lying son-of-a-bitch.' "

On cross-examination Brown stated [Tr. 187]:

"Q. Now, is it not a fact that as soon as you received a warning slip and had a short discussion with him to the effect that you did not do it, is it not true that you at that point saw Lee Melstrom across the way approaching your area, approaching in your direction, and in a loud voice you said, 'You lying son-of-a-bitch, come here?' A. You may be right. I am not infallible, I do make mistakes and I may have signed it or that may have been after I signed it; it was in that same afternoon, yes, it was during that time."

## 2. The Testimony of Employee Fred Davis.

The testimony regarding the circumstances surrounding the alleged coercion of Fred Davis is also in sharp conflict. On direct examination, Davis testified to the following [Tr. 96-97]:

"Q. Directing your attention to February 24, 1965, did you have a conversation with Bredehoft concerning the union? A. Yes, I did.

Q. Where did this conversation take place? A. In my department.

He took me aside from my work for about an hour and a half approximately and asked me why I wanted a union, that we didn't need it.

He also showed me or proceeded to show me a wage scale of other plants which were organized and I said, 'What were they making before they were organized?'

He did not answer the question either.

Then he said, 'Do you know that if they are organized that they will go broke and close down?'

I said, 'Have you heard of this?'

He said, 'Yes,' but he didn't really answer me.

Q. Do you recall anything else that Mr. Bredehoft said? A. Yes, upon leaving, he said, 'You had better make sure you sign the right way.'"

Bredehoft, in direct conflict with Davis' testimony on direct examination, testified that the conversation only lasted "Ten minutes, fifteen minutes at the most" [Tr. 482], that he never said the plant would close down [*ibid.*], and that he said that Davis should vote "... the right way, the way he would be happy with" [*ibid.*]

On cross-examination, Davis clarified his previous testimony [Tr. 121].

"Q. All right, what else did he talk about during your long conversation with him? A. He talked about why I wanted the union and that we didn't need the union. He said that other companies have gone broke because the union got in.

Q. He said other companies had gone broke? A. He also said that we could go broke."

but he said something like that.

Q. Do you recall anything else Mr. Gibola said?

A. He said about a petition going around and he asked me if I had already signed it. I said, no, that I hadn't. He said, 'Frank, you better not.'

But, I cut him short on that and I told him that I had had experience back home with a union that nearly cost me to pay a lot of or a sum of money.

And he told me that it was my privilege to do so, if I wanted a union.

When you are trying to remember, it is kind of hard.

### 3. The Testimony of Frank Medina.

Frank Medina testified that on February 26, he and his supervisor, Edward Gibola, engaged in a conversation concerning the I.A.M. [Tr. 141-142].

"Q. What did Mr. Gibola say and what did you say to Mr. Gibola? A. The conversation started that he didn't want any union in the shop. That is what I recollect anyhow.

He also told me that he didn't want no union and I didn't ask him why. Then the conversation started that I would lose about eighty-five worth of fringe benefits probably.

Q. Was there any other conversation?

(Pause.)

What else did Mr. Gibola say? A. That was about the conversation. He said we could lose the Christmas bonus probably, he didn't say they would take it away from us. He said they would probably take away the spring dinner and the Christmas breakfast. He didn't say the company would,



Q. What else did you say and what else did Mr. Gibola say? A. I told him that I would vote against it. He said, 'Frank, I am not trying to force you or trying to intimidate you; it is your privilege to do what you see fit.'

He did not try to persuade me in any way.

Q. What did you tell Mr. Gibola? A. I said I was going to vote against the union.

Q. What did Mr. Gibola say about the spring dinner and the Christmas bonus or Christmas breakfast? A. He said, we would probably or probably could lose it. That the company would probably take it away.

He said it was my right to vote either way.

He did not say anything for it or against it.

Q. That is what Mr. Gibola said about the spring dinner and the Christmas breakfast? A. Yes.

Q. Would you repeat what you said when he told you about the spring dinner and the Christmas breakfast? A. He said that probably we would lose them, he said that the company would probably take it away."

In direct conflict with this testimony, Edward Gibola stated [Tr. 467-468]:

"Q. Are you aware you are under oath and could be subjected to a perjury charge? A. Yes, I am.

Q. I want you to be entirely sure about this; did you ever tell Frank Medina that if the union came in, the company's free dinners would be lost? A. No, I never made a statement like that, never.

Q. Did you ever tell him that the employees would lose their christmas breakfast or their christmas bonus? A. No, I never did.

Q. Did you ever tell any employee, including Frank Medina, that employees might lose eighty-five cents an hour in fringe benefits if the union came in? A. That is another statement I never made.”

At the end of his testimony, Mr. Medina said [Tr. 145-146]:

“Q. (By Mr. Powell): Now, on Friday, did you have a conversation with me when you were walking down the sidewalk? A. Yes.

Q. And as I was walking past after getting a hamburger down the street, did you stop me? A. Yes, sir.

Q. Did you not essentially tell me that you had been subpoenaed to testify? A. Right.

Q. Did you also tell me essentially, in words, that the testimony to be given about Gibola was not true? A. That is correct again.

Mr. Powell: Your witness.

Mr. Sadur: No further questions.”

## ARGUMENT.

### I.

WHETHER SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND 8(a)(3) OF THE ACT.

**A. The Board's Finding That a Company Rule Against Solicitation on Working Time Did Not Exist Is Erroneous.**

During the last four or five years, Everest & Jennings has been the object of a Union organizing campaign approximately once a year [Tr. 209]. In each of these campaigns the Company has lawfully opposed unionization and has carefully had its attorney train its supervisors in their rights and duties under the Act [Tr. 259]. In none of these prior campaigns has the Company even been charged with an unfair labor practice. Similarly, at the beginning of the I.A.M. campaign, all supervisory personnel were again given training in what they could lawfully do and not do, so as not to interfere with employee rights [*ibid.*].

The entire record in this case indicates not only that a valid rule against solicitation during working time existed prior to the I.A.M.'s campaign, but also that the employees were consciously aware of it. Not one witness at the hearing denied the existence of such a rule prior to the I.A.M.'s organization attempt.<sup>10</sup> All of the direct testimony at the hearing indicates employees were not to solicit or campaign on company time.

Vice-President of manufacturing, Fred Callahan, testified that the Company had established practices re-

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<sup>10</sup>In fact, the General Counsel did not allege or seek to prove at the hearing that a valid no-solicitation rule did not exist; rather this novel theory appeared for the first time in the Trial Examiner's decision [R. 33-34; Tr. 133].



garding union solicitations and campaigning on Company time in prior Union campaigns [Tr. 300], and Company Vice-President Blickensderfer, in uncontradicted testimony, stated that the rule had been in existence prior to the I.A.M. campaign [Tr. 209]. There is no testimony by anyone to the contrary.

It is significant to the existence of the rule that none of the employees who were given written warning slips protested that they were not aware of the rule. As shown by General Counsel's witnesses, these employees either accepted the warning slips [Tr. 19] or denied that they had campaigned on working time [Tr. 65; 130; 158; 178]. No testimony was introduced suggesting that any of the employees were unaware that they were not to engage in solicitation or campaigning while on working time. In fact, some of the employees had been warned by Union representatives that they were not to solicit on Company time [Tr. 129].

The fact that this rule did exist is conclusively shown by the reprimand given to Fred Davis, eleven months before, for engaging in Union activity on Company time [Tr. 300]. The fact that the two incidents were basically similar was admitted by Fred Davis on cross-examination [Tr. 102]:

“Q. (By Mr. Powell): About 11 months ago, Mr. Davis, were you orally reprimanded by your supervisor, Ray Jenkins, for talking on Company time about Union matters? A. Yes, I was.

Q. Whether rightly or wrongly, at least you were aware there was such a rule, were you not? A. Yes.”

In regard to Fred Davis' prior warning, in direct conflict with his own testimony [Tr. 102], the Board found that, “. . . the record does not reveal whether on

the earlier occasion he was absent from his work station, or visiting, or idling.” [R. 39].

Despite the uncontradicted testimony in the case and the obvious inference from the testimony of General Counsel’s own witnesses, the Board found that no rule existed prior to February 12, 1965 forbidding Union activity on working hours [R. 39]. In reaching this conclusion, the Board adopted the reasoning that “If this solicitation did not amount to ‘visiting’ or ‘deliberate idling’ or ‘absence from assigned place of work,’ it violated *no published rule*.” [*Ibid.* (Emphasis added)].

It is well settled, however, that valid no-solicitation rules governing working time do not have to be published. *N.L.R.B. v. Avondale Mills*, 357 U.S. 357 (1958). As stated by the Court in *N.L.R.B. v. W. T. Grant Co.*, 315 F. 2d 83 (9th Cir. 1963), “This (no solicitation) rule need not be promulgated to the employees in written form and can be given to individual employees in the form of warnings as was done in this case.” The reasoning adopted by the Board ignores the applicable law and all of the direct testimony. It is therefore not supported by substantial evidence and should not be enforced. As stated by the Supreme Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 490 (1951):

“Congress has merely made it clear that a reviewing Court can set aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view.”



**B. The Board's Finding, in the Face of Opposing Uncontradicted Testimony, That the Company Encouraged the Filing of Employee Affidavits Is Not Supported by the Evidence.**

The Trial Examiner, at the end of General Counsel's case, dismissed the allegation that the Company had solicited affidavits from its employees. At the close of the hearing, General Counsel made a motion to reverse this ruling, which was denied [Tr. 558]. However, in his decision, the Trial Examiner stated "(u)pon a review of the record I am now convinced that the refusal to reverse was erroneous, even if the original ruling was correct." [R. 39].

The Trial Examiner states that the company's counsel, Powell, suggested to Cornelius that the employees "report in affidavit form any sort of solicitation engaged in by union supporters." [R. 39].

The statements of the only two witnesses at this meeting who were asked to testify, Mr. Callahan and Mrs. Cornelius, establish that this did not occur. Cornelius was told by management, in answer to her question concerning what could be done about working time activities in her department, that because of the dangers inherent in disciplining possible Union organizers, the Company would have to insist that any employee making accusations put them in writing and swear to their truth [Tr. 324, 380-381].<sup>11</sup> Mrs. Cornelius and Callahan both testified that the Company's attorney so stated, and that no one asked her or encouraged her to

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<sup>11</sup>The N.L.R.B. itself takes sworn affidavits from witnesses and relies upon them in determining whether formal complaints should issue.



make a complaint against anyone [Tr. 298; 299; 324; 381].<sup>12</sup>

After the conference with Company officials, Mrs. Cornelius filed an affidavit and then proceeded on her own [Tr. 382] to inform other employees who had likewise been bothered that they could file affidavits. These other employees then voluntarily came in on the afternoon of February 12, 1965, and filed written complaints [R. 34]. Since all employees had the right to complain, management did not prevent them from exercising this right. There is no evidence on the record or off that a supervisor or member of management was present when they gave their statement, that they were told what to say, or that any pressure whatsoever was put on them to make their statements.

The single arguable exception is found in the testimony of Ervin Sinor, that following repeated complaints by him to his supervisor about being bothered by four employees on working time to sign a Union card, his supervisor, Earl Ruffner, came to him on February 12, and told him to go down to the office and make a statement to the notary [Tr. 505].

Ruffner testified without contradiction that Sinor and several other employees in his department had complained to him about being harassed during working time by Union organizers to sign cards, but that he had not taken any action prior to February 12 because of instructions from higher supervisors. While talking casually with the payroll clerk, who also served as a no-

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<sup>12</sup>The Examiner credits Cornelius' testimony, and finds that "Powell added that he was not encouraging her to take such action but that she was privileged to do so." [Trial Examiner's Decision, 4:39-41].

tary public, Ruffner discovered that employees were being allowed to complain in writing about Union activity on working time [Tr. 515-516]. He then went back to Sinor and told him that he could file an affidavit in the front office [Tr. 513].

Other than this isolated incident, it appears conclusively from the evidence that the affidavits were filed spontaneously by the employees after they had either heard about the procedure at lunch time from Cornelius or from other employees. Since all direct testimony indicates that the Company did not encourage its employees to report rules violations,<sup>13</sup> the Board's conclusion is in reality an unwarranted inference. As such, it falls under the Rule that “. . . if the Examiner's determinations and findings are unsupported by any substantial evidence in the record as a whole, or if his inferences drawn from the evidence before him are unwarranted, his conclusions may be judicially reviewed, and, if found wanting, set aside.” *Wah Chang Corp. v. N.L.R.B.*, 305 F. 2d 15 (9th Cir. 1962); *N.L.R.B. v. Isis Plumbing & Heating Co.*, 332 F. 2d 913 (9th Cir. 1963).

Similarly, in *N.L.R.B. v. W. T. Grant*, *supra*, the Court found that the inference that management knew of the anti-union activity of an employee in the face of direct conflicting testimony was unwarranted.<sup>14</sup>

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<sup>13</sup>Even had the company told its employees to report violations of plant rules, it has never been explained how this could be a violation of law.

<sup>14</sup>Petitioner, in its brief, cites *N.L.R.B. v. Howard Cooper Corp.*, 259 F. 2d 558, 559-560 (9th Cir. 1958) and the cases cited therein. These references are inappropriate since they concern cases where the employer encouraged deauthorization or de-

(This footnote is continued on the next page)



**C. The Finding of the Board That the Company, After Receiving Sworn Complaints From the Other Employees, Issued Warning Notices to Harass Pro-Union Employees Is Erroneous.**

In its decision, the Board held that the giving of warning notices to seven employees was part of an overall plan of harassment by the Company of Union supporters. In reaching this result, the Board relied on the fact that the Company supposedly acted in haste and without any investigation whatsoever [R. 40].

The uncontradicted testimony shows, however, that Company officials, since the early part of the I.A.M. campaign, had been faced with declining production; that there had been an increase in unnecessary talking among the employees [Tr. 303]; that Mrs. Cornelius had stated that in her department one of the union supporters was passing out cards and soliciting during working time [Tr. 379]; and that 20 or more employees had sent in written complaints reporting working time union solicitations by other employees. In these circumstances, the Company's natural reaction was to immediately remind employees of the existence of the no-solicitation rule. This the Company did through its routine procedure of written notices and through the letters of February 12 to all the employees.

Admittedly, the Company undertook no formal investigation before issuing the warning beyond questioning the individual's immediate supervisors [Tr. 352]. However, neither customary industrial practice nor the Taft-Hartley Act require employers to disci-

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certification petitions. There is an obvious distinction between employees filing sworn complaints that other employees have violated plant rules and signing petitions which repudiate their allegiance to the Union.



pline employees with the same safeguards accorded criminal defendants. The Act requires only that the employer not discriminate on the basis of union or non-union membership. *N.L.R.B. v. Sebastopol Apple Growers Union*, 269 F. 2d 705 (9th Cir. 1959). In the absence of discrimination, it is accepted law that the Company had the right to hire, fire, or discipline in any manner it chose. *N.L.R.B. v. Prince Marconi Mfg. Co.*, 329 F. 2d 803 (1st Cir. 1964). The record indicates that the Company, when notified of violations, gave warning notices for all campaigning on company time, whether pro-union or anti-union [Tr. 261].<sup>15</sup>

With the exception of Davis, who was a repeat offender, no discharge, layoff or other disciplinary action was taken or was intended to be taken. The “warning” slips were just that. Some of the accused accepted their

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<sup>15</sup>The Examiner’s Decision, adopted completely by the Board in this respect, finds that Respondent openly permitted anti-union campaigning while stifling union campaigning. He notes instances in which several women were seen leaving departments a few seconds after the whistle blew; in only one case is there any indication that this was observed by a supervisor, the supervisor involved had no authority over the particular women employees, and they were already departing at the time it was called to his attention [Tr. 153:20-21]. The Examiner finds that union supporter Davis overheard these women talking in their department about the union, but the undisputed evidence shows that their supervisor could not see or hear these employees from where he was located in the room, and that on the only occasion when it was mentioned to him by Davis, the supervisor went to the women and stopped the discussions [Tr. 109:22-25; 110:8-19; 99:8 and 110:21-25]. The only other incident on which the Examiner’s finding is based is a situation in which he credits a union supporter’s statement about what a partially-deaf supervisor “heard” in a room in which the supervisor was watching another employee and noisy machines with high-powered motors were operating [Tr. 423-424]. On the only occasion when it was clearly shown that anti-union campaigning on company time came to the attention of management, the two employees involved, Cornelius and Weems, were given warning slips; this uncontradicted fact is rejected by the Examiner as “merely pro-forma”.

warnings without complaint, and the matter ended. A few other employees protested, either immediately or at some later time, that they had been unjustly accused. These protests were investigated, nearly all of them within a matter of minutes or hours [Tr. 22-23; 41-41; 67-68; 78-79; 149-150; 158-159; 302; 358; 361; 434-435; 527; 528-530; 550; 555]. The employees who had filed affidavits were called into the Company offices and questioned to determine whether their reports were truthful and accurate. In some instances it was determined that the employees involved had misunderstood what "Company time" included and that the union activity of the person accused had been at lunch or coffee break. In these instances, Company officials withdrew the warning slips from the personnel file of the person accused and his supervisor promptly delivered an apology on behalf of the Company [Tr. 149; 158; 302; 358; 361]. In most instances, the employees who had reported the violations stuck to their stories. After evaluating the denial and the reaffirmed accusation in these cases, the Company decided to persist in the warning, particularly since it was just a precautionary warning and carried no penalty unless again violated.

**D. The Board's Finding That the Company Laid Off Fred Davis for Three Days Because of His Union Activities Rather Than for His Second Violation of a Valid Solicitation Rule, Is Unsupportable.**

The layoff of Fred Davis stands in the same position as the other warning slips, except that as the only repeat offender, Fred Davis received a short layoff rather than a warning notice. The Board's finding here proceeds from the erroneous conclusion that there was



no rule against Union solicitation during working hours prior to February 12. However, the record establishes that the Company rule had long been interpreted to prohibit all Union solicitation during working hours. Davis himself admittedly had been reprimanded under the rule less than a year before, and his supervisor, Jenkins, recalled the prior incident to him at the time of his layoff [Tr. 95]. He was told at the time that his layoff was for soliciting during working hours [Tr. 93-95]. While Davis claimed that he was not guilty, he never expressed any surprise at the rule itself. In fact, at the hearing, he admitted he was well aware of the rule [Tr. 102]. Neither Davis nor any other employee ever claimed that no such rule existed or that they had not been informed of it; their defense was that they knew of the rule and were not guilty of breaking it.

The Board credits Davis' testimony that he denied to superintendent Jenkins that he was guilty [R. 41]. Whether he denied it or not however, is immaterial. Davis had in fact violated the rule before, and the Company had received, in addition to the oral report from Cornelius, three sworn affidavits stating that he was doing so again. Davis himself acknowledged that because of the great deal of talking he was doing, the Company might have good reason to think him guilty [Tr. 103]. The record indicates that, in fact, Davis *was* soliciting for the union during working hours. Marvin Cheek, who worked in the same room with Davis, testified that Davis initiated discussions with him and sought to get him to sign a Union card during working time almost every day [Tr. 533-543]. The Trial Examiner credited the testimony of Cornelius that Davis tried to get her to sign a Union card during



working time [R. 39]. Similarly, he credited the testimony of Weems that Davis approached her during working time and indicated that she could remedy her difficulties by signing up with the Union [*ibid.*].

The facts in this case are similar to those in *N.L.R.B. v. W. T. Grant Co.*, *supra* (9th Cir. 1963), where the Company, after giving the employee an oral warning not to campaign for the Union on Company time, discharged her for Union solicitation during working hours. The court found that a no-solicitation rule promulgated in the form of an oral warning was valid and that a subsequent discharge for violation of such rule was not illegal.

**E. The Finding That the Company Terminated Truesdell Brown as Part of an Anti-Union Campaign Is Untenable in the Face of Brown's Destruction of Company Property and His Use of Abusive Language.**

On February 15, Truesdell Brown was served with a warning slip similar to the others given out on that date. Brown testified that when he read it, he looked up at Lee Melstrom and merely said, "Hey, Melstrom." [Tr. 198]. When Melstrom replied that he had seen Brown soliciting while at work, Brown admitted that he blew up and called Melstrom a "lying son-of-a-bitch." Afterwards, according to Brown, he and Melstrom got their differences straightened out and Brown apologized to Melstrom [Tr. 179-180].

Brown's supervisor, Bill Hester, also related that immediately after reading the slip, Brown flew into a rage and shouted to Melstrom, "Come here, you lying son-of-a-bitch." [Tr. 519]. He testified that there was considerable confusion and arguing and that Brown drew

back to strike Melstrom and that he had to step between them [*ibid.*].

Hester's testimony is the more credible in the light of succeeding events. When Hester related the incident to Callahan and Superintendent Godfrey, they decided that the direct violation of published Company rules [R. Ex. 3]—engaging in abusive language and threatening a fellow employee—merited at least a warning notice. This time when Brown was given the warning notice, there is no dispute that he immediately flew into a rage and complained that the Company was trying to fire him [R. 37; Tr. 179]. Godfrey told him that this was not true and that the slip was simply to reprimand him for his threats and abusive language [Tr. 547]. Brown, however, defiantly ripped his warning notice (including copies which were to go into the Company's file [Tr. 360]) into pieces and threw it down in front of his supervisors and his fellow employees [Tr. 526].

Under these circumstances, Brown's termination was completely justified.<sup>16</sup> Employers need not tolerate the direct violation of plant rules. *Salinas Valley Corp. v. N.L.R.B.*, 334 F. 2d 604 (9th Cir. 1964); *N.L.R.B. v. J. C. Britton Co.*, 352 F. 2d 797 (9th Cir. 1965); *N.L.R.B. v. Soft Water Laundry*, 346 F. 2d 930 (5th Cir. 1965); *Continental Distilling Sales Co. v. N.L.R.B.* 348 F. 2d 246 (7th Cir. 1965). Brown's initial reaction was in direct contrast—even as he testified to it—to the actions of other employees, who also had been given warning notices. His response to the second warning notice was outright insubordination in front of other employees. If he felt that he had been wronged,

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<sup>16</sup>As indicated previously, the State of California, after a full hearing so held.



he had the same right as the other employees to protest his case. He did not have the right to tear up a record which was to go in the company files, to show disrespect to supervisors, or to abuse and threaten his fellow employees. Brown's entire attitude is summed up in his final interview where he was asked if he had anything to say for himself. He told Vice-President Callahan, "Do I have to stand here and listen to any more of this shit?" [Tr. 525].

**F. The Finding That the Company Threatened Employees Medina and Davis With Loss of Economic Benefits Is Not Valid in View of the Conflicts in the Testimony of Each Employee.**

The Board found that ". . . Bredehoft said that a union victory might or could cause the closing of the plant . . ." [R. 40]. This conclusion was reached by crediting the testimony of Fred Davis over that of his supervisor, Bredehoft. Given conflicting testimony of equal weight, the issue of credibility was for the trial examiner. However, in this case, the Board totally ignored that Davis himself later clarified what Bredehoft had actually said to him. In his later testimony, Davis explained that Bredehoft actually said: "other companies have gone broke because the Union got in."<sup>17</sup> [Tr. 121-122]. "Going broke" is an event over which the Company has no control and is, therefore, merely a legal expression of opinion. *J. S. Dillion & Sons Stores Co. v. N.L.R.B.*, 338 F. 2d 395 (10th Cir. 1964); *Texas Industries, Inc.*, 336 F. 2d 128 (5th Cir. 1964); *Henry I. Siegel Co., Inc.*, 328 F. 2d 25 (2nd Cir.

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<sup>17</sup>This statement is far more consistent with "the published view of the Respondent that a Union might reduce its chances of competing successfully." [R. 40].



1964); *N.L.R.B. v. Brownwood Mfg. Co.*, 363 F. 2d 136 (5th Cir. 1966). In *N.L.R.B. v. Transport Clearing, Inc.*, 311 F. 2d 519, 524 (5th Cir. 1962) when the company told employees that unionization might force it out of business, the Court said:

“ . . . (This) is an example of a prophecy by an employer of dire consequences that may flow from a Union’s policy or practices rather than from action and is privileged under the free speech section of the Act.”

The Board also credited the testimony of Frank Medina that on February 26, his supervisor said that a union would bring about an end to fringe benefits totalling eighty-five cents an hour, and could, or would, cost the employees their Christmas bonus, the spring dinner, and Christmas breakfast. Again, conflicting testimony of equal weight provides an issue of credibility for the discretion of the trial examiner. However, here also the Board totally ignored the later statements of the witness it credited. As reported in the Statement of Case, Medina was asked if he had not said that the testimony to be given about Gibola was not true. Medina’s affirmation that the testimony would not be true is passed over by the Board with the statement, “that untrue testimony would be or might be offered against Gibola, had no reference to Medina’s own testimony.” [R. 41]. The facts indicate, however, that the only allegations directed at Gibola and litigated were those involving Medina, and, in fact, Medina was the only witness to appear concerning Gibola. To say, therefore, that Medina was not referring to himself, is totally untenable and is not supported by the record.<sup>18</sup>

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<sup>18</sup>The Examiner states that Medina was not shown to be a Union supporter. If not, it is remarkable that he filled out his pre-trial statement at the union hall [Tr. 143.20].

**G. The Board's Conclusion That the Company Adjusted Woelke's Seniority Rights in an Attempt to Weaken His Interest in the Union Is Unsupportable.**

The Board found<sup>19</sup> that by granting a more advantageous seniority date to Woelke in an attempt to weaken his interest in the Union, the Company discriminated in regard to his tenure of employment, discouraging activity on behalf of the Union, thereby violating Section 8(a)(3) and 8(a)(1) of the Act [R. 40]. This finding is unsupportable. The bare essentials necessary to a *prima facie* violation here would be (1) proof that the Company's officials who considered and ruled upon Woelke's grievance knew of his Union sympathies, and (2) that their motivation was an illegal and improper one. Unlawful motives are not lightly to be presumed. The burden is on the General Counsel to prove the essential elements of his charges by a preponderance of the evidence.

The Board's decision assumes that the Woelke matter was not the routine handling of a grievance and that Respondent's officials knew of Woelke's Union sympathies and intended, by their favorable handling of the grievance, to lure Woelke away from the Union. These assumptions are not supported by the record. The Company's published grievance procedure provides that a grievance shall proceed through various steps at the option of the employee. It first goes to the employee's supervisor, secondly to the personnel department, and thereafter the procedure permits the grievant, if he wishes, to obtain the counselling and rep-

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<sup>19</sup>This incident was not alleged in the complaint, and evidence concerning it was taken over Respondent's objections.



resentation of the Company's labor attorney. Finally, the employee is entitled to obtain a meeting directly with the Company president. Woelke had earlier pursued his grievance only as far as the personnel department and then apparently dropped it. It was certainly, therefore, not any material departure from the established grievance procedure to permit him to resort to the final two stages of the grievance procedure by setting up a meeting with the Company president and its labor attorney.

More importantly, the record establishes, without contradiction, that there existed an "open-door policy" which permitted employees to present individual complaints to top management at any time [Tr. 295]. The employee's privilege under this policy was in addition to any he might have under the grievance procedure. The Company's actions, therefore, were merely an effectuation of their own well-established policies. The denial of these procedures to Woelke would have resulted in a charge that the employer was discriminating, in violation of the Act, against Woelke because of his Union membership.

The Board's second assumption is based upon a fact directly contrary to the evidence. The Board expressly found that supervisor Bredehoft informed the other Company officials of Woelke's Union sympathies. The record, however, is directly to the contrary. Bredehoft testified that he did not mention to management officials anything about Woelke's Union membership or sympathies, either before the grievance meeting [Tr. 485-486], or at the meeting [Tr. 486-487]. Woelke testified that there was no mention at the meeting of his discussion with Bredehoft about the Union, no



mention of his union views, and in fact, no mention of the word “union” at all [Tr. 170].

The Boards decision, therefore, is based entirely on conjecture and supposition. It is, in fact, directly contrary to the evidence.

### **Conclusion.**

For the foregoing reasons the decision of the National Labor Relations Board on the record as a whole was not based upon substantial evidence and, therefore, should not be enforced.

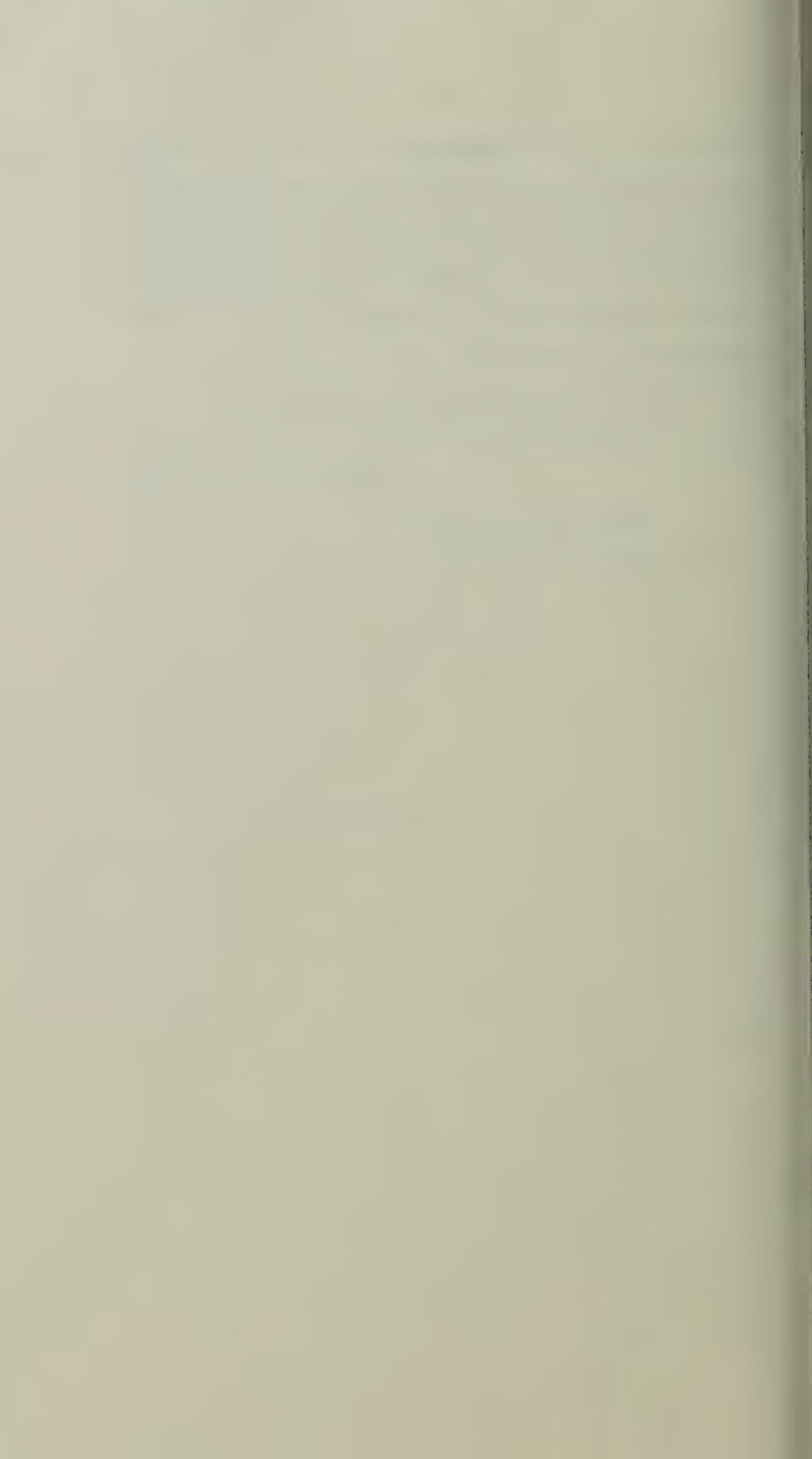
LYMAN B. POWELL

*Attorney for Respondent.*

### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LYMAN B. POWELL





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No. ~~19849~~

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IN THE  
United States Court of Appeals  
For the Ninth Circuit

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SHIBO HAYASHI, an individual; and SHIBO HAYASHI,  
SHIZUYE OKIMOTO and FUGIO OKIMOTO, individuals  
d/b/a GREAT NORTHERN PEAT COMPANY,  
*Appellants,*

v.

RED WING PEAT CORPORATION,  
a Texas Corporation,  
*Appellee.*  
and

SUNSHINE GARDEN PRODUCTS, INC., a California Corporation;  
WILSON & MEYER & Co., a Nevada Corporation; WESTERN  
PEAT COMPANY, LTD., a Canadian Corporation; LULU  
ISLAND PEAT MOSS COMPANY, LTD., a Canadian Corpora-  
tion; MEADOWLAND FARMS, LTD., a Canadian Corporation;  
WESTERN PEAT MOSS, LTD., a Canadian Corporation;  
NORTHERN PEAT MOSS, LTD., a Canadian Corporation; and  
RICHMOND PEAT MOSS, LTD., a Canadian Corporation,  
*Defendants.*

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APPEAL FROM UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

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HONORABLE WILLIAM J. LINDBERG, *Chief Judge*

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BRIEF OF APPELLANT

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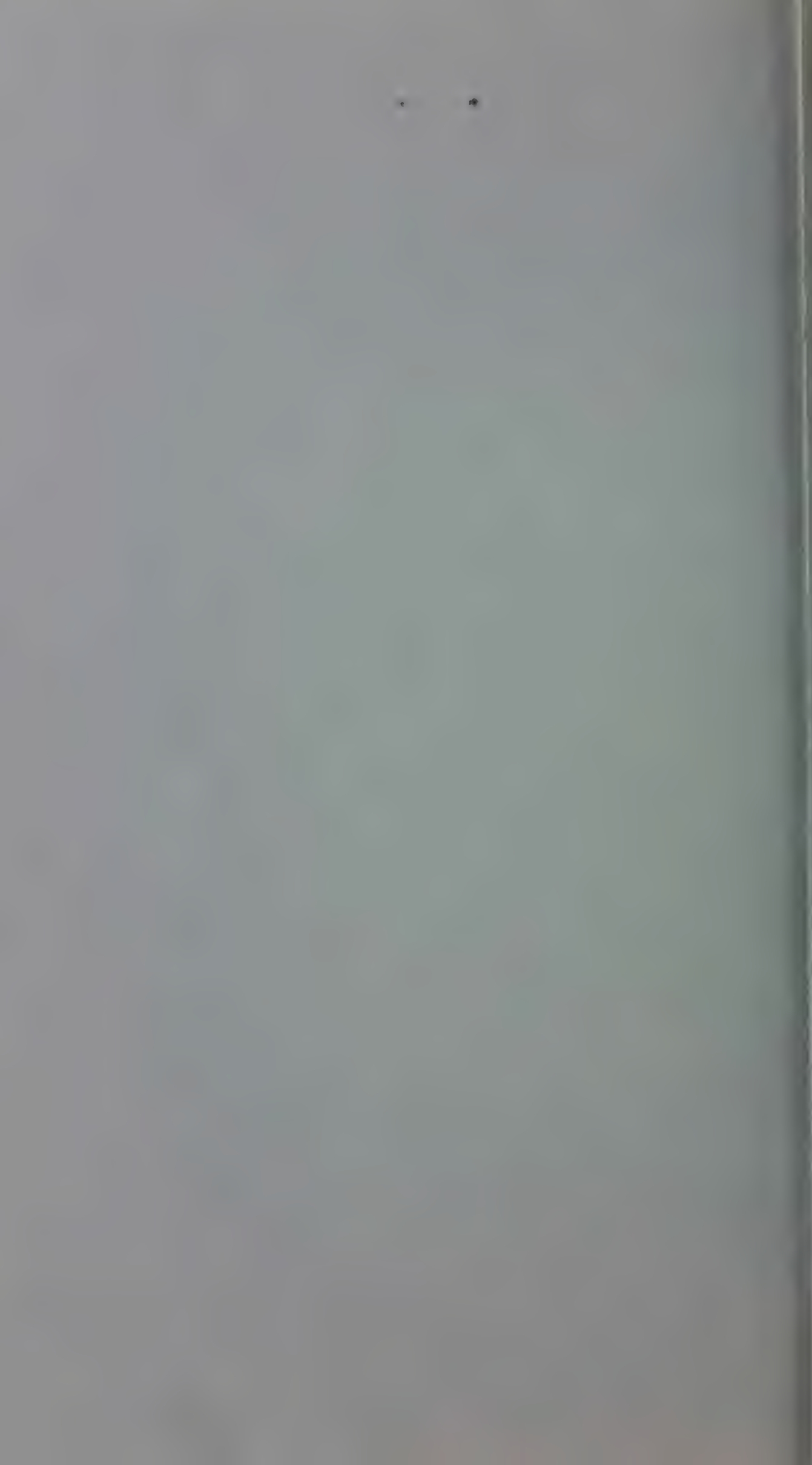
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# United States Court of Appeals For the Ninth Circuit

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No. 19343

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SHIBO HAYASHI, an individual; and SHIBO HAYASHI,  
SHIZUYE OKIMOTO and FUGIO OKIMOTO, individuals  
d/b/a GREAT NORTHERN PEAT COMPANY,

*Appellants,*

v.

RED WING PEAT CORPORATION,  
a Texas Corporation,

*Appellee.*

and

SUNSHINE GARDEN PRODUCTS, INC., a California Corporation;  
WILSON & MEYER & Co., a Nevada Corporation; WESTERN  
PEAT COMPANY, LTD., a Canadian Corporation; LULU  
ISLAND PEAT MOSS COMPANY, LTD., a Canadian Corpora-  
tion; MEADOWLAND FARMS, LTD., a Canadian Corporation;  
WESTERN PEAT MOSS, LTD., a Canadian Corporation;  
NORTHERN PEAT MOSS, LTD., a Canadian Corporation; and  
RICHMOND PEAT MOSS, LTD., a Canadian Corporation,

*Defendants.*

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APPEAL FROM UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

HONORABLE WILLIAM J. LINDBERG, *Chief Judge*

---

## BRIEF OF APPELLANT

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### NATURE OF THIS APPEAL

This is an appeal from the Order of the United States  
District Court for the Western District of Washington,  
Northern Division, dismissing Red Wing Peat Corpora-

tion upon a finding that venue over Red Wing Peat Corporation in said district is improper. The action is one brought by the plaintiffs to recover damages pursuant to Section 4 of the Clayton Act (15 U.S.C.A. § 15) for violations of the antitrust laws of the United States (15 U.S.C.A. § 1, 2, 8, 13 and 13(a)).

### STATEMENT OF THE CASE

On December 1, 1966, the trial court entered an Order dismissing Red Wing Peat Corporation from this action upon a finding that venue was improperly laid in the Western District of Washington (Document 67). Subsequently, on December 23, 1966, the plaintiffs filed Notice of Appeal from that Order (Document 68).

The facts which establish venue in this case are contained in the sworn statement of Mr. John Bell taken in Seattle, Washington, on February 17, 1964, which sworn statement is the attachment to the Affidavit of George Kargianis filed in this cause on May 2, 1966 (Document 44), together with the Affidavit of Thomas J. Greenan filed October 26, 1966 (Document 61), with attachment. Mr. John Bell is a resident of the Province of British Columbia in the Dominion of Canada and is the major shareholder in Northern Peat Moss, Ltd., a Canadian peat moss producer and one of the defendant companies in this case. In the following summarization of facts, the references will be to the pages of the Bell statement attached to the Affidavit of George Kargianis, unless it is otherwise indicated that the reference is to the transcript of proceedings before the court below.

The Canadian corporations, defendants in this case are the dominant processors of peat in Western Canada



and are the principal distributors of peat products in the Western area of the United States (5). They market approximately eighty-five percent (85%) of their products in the 11 Western States, principally in Washington, Oregon and California (6). They sell more peat in these three states than do all of their competitors combined.

During the period 1953 until about June 30, 1961, the defendants marketed their product jointly through a Canadian corporation called Canadian Peat Moss, Ltd. (CPML) (13). CPML was formed and used by the defendant producers to establish and to maintain market quotas and to fix and to stabilize the prices at which the defendants sold their products in the United States (13-19; 34-36). At the conclusion of each year the defendants shared the profits or losses of CPML in accordance with an agreed schedule of percentages (13-14).

During most of the period involved in this case, CPML marketed all of the peat moss produced by the Canadian defendant producers and sold said products in the United States through the defendants Wilson & George Meyer & Co. and Sunshine Garden Products, Inc. (15-19). These two firms had common ownership (11).

On or about June 30, 1961, a consent decree was entered in the United States District Court for the Northern District of California in a civil antitrust action brought by the Justice Department (Southern Division Civil No. 38606), which prohibited Sunshine Garden Products, Inc. from representing CPML (18-19). CPML was thereafter dissolved (18). Thereafter, Western Peat Company, Ltd. (referred to in the Complaint and hereinafter as "Old Western"), by agreement among the other defendant pro-



ducers replaced CPML as the marketing agent. "Old Western" then sold through Wilson & George Meyer & Co. The marketing structure remained the same as it had when products were sold through CPML. The defendant producers marketed their products through "Old Western," in accordance with market percentages allotted to each producer and they shared the profits or losses of "Old Western" in accordance with the same allocation percentages. This formula was the same as was used when CPML acted as marketing agent (19, 28-30; 61-64).

Mr. John Fleming was the manager of CPML, and during the years of existence of that organization he had authority from the various members and exercised that authority to dictate policy; i.e., the raising and lowering of prices, and the areas of market concentration (23, 24 and 25). When "Old Western" undertook to act as the marketing agent of the Canadian producers, Fleming continued to direct the policies of the marketing group (29).

In the Spring of 1963, the appellee, Red Wing Peat Corporation, a Texas Corporation, formed a corporation in Canada called Western Peat Moss, Ltd. ("New Western" in the Complaint and hereinafter). "New Western" purchased all of the assets of "Old Western" and of individual peat producers. "New Western" is a wholly owned subsidiary of Red Wing Peat Corporation, and Mr. John Dunfield is the president of both corporations. (Attachment to Affidavit of Thomas J. Greenan, Document 61). After the acquisition of the assets of "Old Western" by "New Western," the formal meetings eventually ceased

for the reasons that the American interests which had acquired the assets of "Old Western" expressed worry about antitrust violations and advised Fleming and his associates not to meet with the Canadian producers as a group but to continue operations as before (28).

In 1960, the plaintiffs commenced the production of their peat in Snohomish County, Washington, and distributed their product in Western Washington (20). Fleming implied to the Canadian producers that Wilson & Meyer & Co. could handle the problem arising from plaintiffs' competition (23). Pursuant to authority from the defendant producers, the prices for all of defendants' peat were fixed by Wilson & George Meyer & Co. and Fleming (23, 25). In order to meet this problem and to suppress the competition of the plaintiffs, a new size package was adopted and prices were lowered in Seattle and Renton, Washington, the area in which plaintiffs were a competitive factor. Losses incurred in selling at lower prices in competition with the plaintiffs were recovered by raising prices elsewhere (22-26). The defendants continued to sell at depressed prices in the market in which plaintiffs were attempting to sell, primarily Western Washington, until the plaintiffs discontinued business. At that time, the defendants raised their prices. The defendants' prices were never lowered in Eastern Washington, Oregon or California, areas in which the plaintiffs were not a competitive factor (39-45, 56).

After the formation of "New Western" and its acquisition of the assets of "Old Western," Fleming continued his activities for the marketing group. Fleming is an officer of Red Wing Peat Corporation and in that capacity



has appeared before the United States Tariff Commission, in connection with anti-dumping charges, on behalf of both Red Wing and "New Western" (Greenan Affidavit and attachment, Document 61).

The defendants, Lulu Island Peat Company, Ltd., Coast Peat Company, Ltd. and Blundell Peat Company Ltd. filed motions to dismiss on the grounds of lack of jurisdiction, improper venue and insufficiency of service of process (Document 35). After two hearings in open court (Reporter's Transcript of Record, May 6, 1966; Reporter's Transcript of Record, June 3, 1966, pages 1-52), the court denied those motions, relying on the statement of Mr. Bell attached to the Kargianis Affidavit which has been referred to throughout (Document 54). Subsequently, defendant Red Wing Peat Corporation moved to dismiss on the grounds of lack of jurisdiction, improper venue and insufficiency of service of process (Document 56). After the filing of memoranda and argument in open court (Reporter's Transcript, October 28, 1966, pages 1-26; and Reporter's Transcript, November 14, 1966, pages 1-4), the court determined that once venue had been challenged, the burden was upon the plaintiffs to prove proper venue pursuant to the applicable sections of the Clayton Act. The plaintiffs presented the court with the facts as aforesaid and requested the court to deny the motion of Red Wing until the plaintiffs had completed their trial preparation without prejudice to the right of Red Wing to renew its motion after all of the facts were known. (Plaintiffs' memoranda in opposition to the Red Wing motion, Documents 60 and 63). The court declined the request, suggesting appeal at this point while the record was simple (Reporter's Transcript, Octo-



ber 28, 1966, page 21, line 18—page 22, line 10).

### **SPECIFICATION OF ERRORS**

The appeal specifies error on the part of the trial court as follows:

1. The court erred in ordering dismissal of the Red Wing Peat Corporation from this action, finding that venue over Red Wing Peat Corporation in this District was improper (Document 67).

2. The court erred in holding in its memorandum opinion that the court lacked jurisdiction over the person of Red Wing Peat Corporation (Document 72).

3. The court erred in holding in its memorandum opinion that venue as to defendant Red Wing Peat Corporation was improperly chosen because Red Wing did not reside in, was not found, did not have an agent in, was not an inhabitant of and did not transact business in the Western District of the State of Washington (Document 72).

4. The court erred in holding in its memorandum opinion that service of process on the defendant, procured in the State of Ohio, was insufficient (Document 72).

### **ARGUMENT ON APPEAL**

It is the contention of appellants that the record before the trial court adequately established facts which support jurisdiction and venue in the Western District of Washington, Northern Division, and that the court should have denied the appellee's motion to dismiss without prejudice to appellee's right to renew the motion after all pretrial discovery has been completed.

## I. Venue

At the trial level, the appellee contended, and the court found in its memorandum opinion and in its order dismissing Red Wing Peat Corporation, that venue in the Western District of Washington was improper because Red Wing is neither “found” in that district, nor does it “transact business” in said district. This having been found, the court concluded that service of process on Red Wing, outside the boundaries of the State of Washington, was invalid.

In cases of this sort, as the trial court recognized, the first question to determine is venue, because if venue is properly laid, then the question of service of process becomes relatively simple. This is demonstrated in the case of *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders, and Exhibitors' Association of America*, 344 F. 2d 960 (9th Cir. 1965). In that case, after a thorough discussion of the problem of venue, the court stated (p. 866):

“Although, as agreed to by the Association, once venue is found to lie in the Southern District of California the matter of service becomes of minor import, we think that the service of process upon the Association’s Regional Vice-President was sufficient.”

This case is based upon Section 4 of the Clayton Act (15 U.S.C.A. 15) which provides:

“Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and



the cost of suit, including a reasonable attorney's fee."

Since the appellee is a corporation, Section 12 of the Clayton Act (15 U.S.C.A. 22) also applies. This section reads:

"Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

Section 12 of the Clayton Act (15 U.S.C.A. 22) provides that a suit under the antitrust laws against a corporation may be brought in any district in which the corporation "may be found or transacts business." Section 4 of the Clayton Act, however (15 U.S.C.A. 15) provides that such an action may be brought in any district in which the defendant is "found," but this section omits the words "transacts business." The courts have held that the omission of these words in Section 4 is not a limitation upon Section 12 but that, on the contrary, Section 12 was an enlargement of the special venue privileges provided in Section 4. This point was established in the 1925 decision of the United States Supreme Court entitled *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U.S. 359, 71 L.Ed. 699. In that case, the Supreme Court expressly stated that the purpose of Section 12 was to enlarge the jurisdiction of the district courts so as to establish venue not only in a district in which a defendant corporation resides or is "found" but also in any district in which it transacts business, even though it might not reside or be found in said district.



The court went on to say that in the event venue is established by the transaction of business, process may be issued to and served in any district in which the corporation either resides or is "found." See also, *American Football League v. National Football League*, 27 F.R.D. 264 (D.C. Md. 1961); *Riss & Co. v. Association of Western Railways*, 162 Fed. Supp. 69 (D.C. 1958); *Boston Medical Supply Co. v. Brown & Connolly*, 98 Fed. Supp. 13 (D.C. Mass. 1951), affirmed in 195 F.2d 853 (1 Cir. 1951).

#### *A. Liberal Construction of Special Venue Statutes.*

The special venue statutes provided in the Clayton Act were intended to remove the limitations upon venue which were applicable in diversity cases. See *Thorburn v. Gates*, 225 Fed. 613 (D.C. N.Y. 1915). Thus it has been repeatedly declared that these special venue provisions were intended to broaden the range within which an injured plaintiff may sue for damages, beyond that which is generally applied in cases where no special venue statute is applicable. See *United States v. Scophony Corp.*, 333 U.S. 795; *Cinema Amusements v. Loew's Inc.*, 85 Fed. Supp. 319 (Del. 1949); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D. Cal. 1957); *Anderson-Friberg, Inc. v. Justin R. Clary & Son*, 98 Fed. Supp. 75 (S.D. N.Y. 1951). The object of the special venue statutes is to provide a plaintiff with a wide choice in the selection of venue so that an injured party may institute an action with the least expense possible. See *Cinema Amusements v. Loew's, Inc.*, 85 Fed. Supp. 319 (Del. 1949). Indeed, because enforcement of the antitrust laws is considered so vital a phase of our society, the law has

been interpreted in a manner designed to provide an injured party a ready and convenient forum, despite the fact that this might result in hardship to the defendant or defendants in cases based upon other laws and upon the general venue statutes. See *Ferguson v. Ford Motor Co.*, 77 Fed. Supp. 425 (D.C. N.Y. 1948); *Green v. United States Chewing Gum Mfg. Co.*, 224 F.2d 369 (10 Cir. 1955); *United States v. National City Lines*, 334 U.S. 573, 92 L.Ed. 1584; *Sharp v. Commercial Solvents Corp.*, 232 Fed. Supp. 323 (D.C. Tex. 1964).

The trend of the decisions is to permit the plaintiff to bring his action in that district where his injury took place, regardless of technical legal concepts and literal definitions of the words in the special venue statutes. See *Seaboard Terminals Corporation v. Standard Oil Co. of New Jersey*, 104 F.2d 659 (2 Cir. 1939); *Electric Theatre Co. v. 20th Century-Fox Film Corp.*, 113 Fed. Supp. 937 (D.C. Mo. 1953); *Goldlawr, Inc. v Shubert*, 169 Fed. Supp. 677 (E.D. Pa. 1958). In the *Goldlawr* case the court expressed the point by stating that the language of Section 22 of the Clayton Act broadened the concept of "found," even in the case of individual defendants, and provided for the injured party "the right to bring suit . . . in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries."

So, in order to further the legal and philosophic objectives of the antitrust laws and aid in their enforcement, it has been invariably held that the concept of "transacting business" for venue purposes under the antitrust laws requires less business activity than is required to provide



venue in cases based on other laws. The term "transacting business" is construed in its practical, not its technical, sense, and from the commercial rather than a legal point of view. *Hansen Packing Co. v. Armour & Co.*, 16 Fed. Supp. 784 (D.C. N.Y. 1936); *Friedman v. U.S. Trunk Co.*, 30 F.R.D. 148 (D.C. N.Y. 1962); *Crawford Transport Co. v. Chrysler Corp.*, 191 Fed. Supp. 223 (D.C. Ky. 1961); *Bertha Bldg. Corp. v. National Theatres Corp.*, 140 Fed. Supp. 909 (D.C. N.Y. 1956) reversed on other grounds, 248 F.2d 833; *Riss & Co. v. Association of American Railroads*, 24 F.R.D. 7 (D.C. 1959); *Sunbury Wire Rope Mfg. Co. v. U.S. Steel Corp.* 121 Fed. Supp. 425 (D.C. Pa. 1955); *Ohio-Midland Light & Power Co. v. Ohio Brass Co.*, 221 Fed. Supp. 405 (D.C. Ohio 1962); *Rhode Island Fittings Co. v. Grinnell Corp.*, 215 Fed. Supp. 198 (R.I. 1963). Indeed, the Court of Appeals for the Ninth Circuit has declared that one act may be sufficient to provide venue under the damage provisions of the antitrust laws. See *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' & Exhibitors' Association of America*, 344 F.2d 960 (9 Cir. 1965).

To provide venue under these statutes it is not necessary that the defendant be physically present in the district in which the suit is instituted. *Freeman v. Bee Machinery Co.*, 319 U.S. 448, 87 L.Ed. 1509. In this connection even where the courts have based venue on the term "found" it has been held that that word, in the sense of venue, does not require physical presence in the jurisdiction. *Fooshee v. Interstate Vending Co.*, 234 Fed. Supp. 44 (D.C. Kan. 1964). Moreover, the term "transacting business" as interpreted under these special venue statutes, does *not* require that there be an agent in the



district in which the suit is instituted. See *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U.S. 359, 71 L.Ed. 699; *Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corporation*, 46 F.2d 623 (1 Cir. 1931); *Wentling v. Popular Science Pub. Co.*, 176 Fed. Supp. 652 (D.C. Pa. 1959).

The burden of proof to establish venue in this type of case, as in all cases, is upon the plaintiff. It is frequently impossible, however, to meet this burden at the outset of a case. If it were the inflexible rule that this burden must be met once and for all at the very outset of the case and prior to any discovery, then a defendant in any case could defeat the right of an injured party to bring his action in an appropriate district merely by the filing of contravening affidavits. Accordingly, final determination of the issue of venue is frequently deferred until the facts concerning venue have been developed to such a degree that the court, to its satisfaction, can intelligently make a ruling one way or another. In the case of *Metropolitan Sanitary District of Greater Chicago v. General Electric Co.*, 208 F. Supp. 943 (D.C. Ill. 1962) Judge Robson, after disposing of a challenge to service of process declared:

“However, plaintiff must still show that venue in this district, as provided for in Section 15, is proper. Therefore, no ruling will be made on defendants’ motions to dismiss pending completion of plaintiff’s pretrial discovery as to venue.”

Throughout the proceedings leading up to the order dismissing Red Wing Peat Corporation from this action, the appellants urged the trial court to give them the opportunity to fully develop the facts, by way of pretrial

discovery, prior to ruling on the motion. The court was of the opinion that once venue had been challenged, it was incumbent upon the plaintiff to clearly establish the facts supporting venue.

A number of decisions have observed that it is extremely difficult, if not impossible, to determine the question of venue prior to having access to all the facts on the question of whether a defendant "transacts business" or is "found" within the district. Accordingly, these courts have denied motions identical to the one involved in this appeal until the plaintiff has had a complete opportunity to inquire into all facts supporting venue.

The case of *Permagent v. Frazer*, 93 F. Supp. 9 (E.D. Mich. 1949) involved a similar situation, wherein a parent corporation was moving to dismiss on the grounds of mislaid venue, claiming no connection with its wholly owned subsidiary. Therein (p. 12) the court observed:

"There has been a change in the attitude of the courts towards this much debated and perplexing question that has been before our tribunals for years and there is a tendency now to cut through the maze of corporate appearances to arrive at the true status and relationship. The fiction of corporate entity is no longer controlling. It is possible and permissible for a corporation not to desire to do business in a certain state and to create a separate corporation for that purpose. But if the separate corporation is actually so attached to the parent that the parent is in fact doing business in this state then the court must not permit vociferous contrary claims of the parent to prevail."

The court then went on to deny the motion to dismiss, without prejudice to the parent's right to renew the motion when all the facts had been established. Each of the fol-



lowing cases holds that these matters should be left for decision until after the completion of pretrial discovery:

*School Dist. of Philadelphia v. Kurtz Bros.*, 240 F. Supp. 361 (D.C. Pa. 1965);

*Ziegler Chemical & Mineral Corp. v. Standard Oil Co. of Cal.*, 32 F.R.D. 241; (D.C. Cal. 1962);

*Halewia Theatre Co. v. Forman*, 37 F.R.D. 62 (D.C. Hawaii 1965);

*State of Cal. v. Brunswick Co.*, 32 F.R.D. 36 (D.C. Cal. 1961);

*Spohn v. United States*, 16 F.R.D. 240, 241 (S.D. N.Y. 1954);

*General Industries Co. v. Birmingham Sound Reproducers, Ltd.*, 26 F.R.D. 559 (E.D. N.Y. 1961);

*Anderson-Friberg, Inc. v. Justin R. Clary & Son*, 98 F. Supp. 75 (S.D. N.Y. 1951);

*Hawn v. American S.S. Co.*, 26 F. Supp. 428 (W.D. N.Y. 1939);

*Noerr Motor Freight v. Eastern R.R. Presidents Conference*, 113 F. Supp. 737 (E.D. Pa. 1953);

*Kierulff Associates v. Luria Brothers & Company*, 240 F. Supp. 640 (S.D. N.Y. 1965);

*Ferraioli v. Cantor*, 259 F. Supp. 842 (S.D. N.Y. 1966);

*Collins v. New York Central System*, 327 F.2d 880 (D.C. Cir. 1963).

## ***B. Facts Supporting Venue***

As has been shown earlier, continuously, since 1953, the defendant peat moss producers have engaged in a combination and conspiracy to establish and maintain market quotas and to fix and stabilize prices at which their products were sold in the United States. At the conclusion of each year, these defendants have shared in the



profits and/or losses of their combination in accordance with an agreed schedule of percentages. This combination has operated, at various times, through the vehicles of Canadian Peat Moss, Ltd. (CPML), Western Peat Moss, Limited ("Old Western") or Western Peat Company, Ltd. ("New Western"). Mr. John Fleming has been the individual directing the policies of the combination, in all of its various forms, and he has been, at one time or another, the manager of CPML, and an officer of "Old Western" and "New Western."

In 1963, the appellee, Red Wing Peat Corporation, formed "New Western," and through the instrumentality of that company, acquired all of the assets of "Old Western." "New Western" is a wholly owned subsidiary of Red Wing, and Mr. John Dunfield is the president of both corporations. Mr. Fleming is also an officer of Red Wing.

In his sworn statement which is attached to the Kargianis Affidavit filed in opposition to certain of the defendants' motions to dismiss (Document 44), Mr. John Bell, president of one of the defendant producers, has this to say about the situation of the Canadian combination after the acquisition of the assets of "Old Western" by American interests:

"We had some spasmodic meetings after Western Peat Moss became the sales organization, and after April of 1962 we had no meetings at all, and the reasons for that were because some American interests bought out Western Peat, and they were worried to death about any antitrust legislation and advised Fleming and Gilley to not talk to us as a group but to continue in the same manner." (28)

The appellee has filed an affidavit in support of its

motion to dismiss (Document 57) in which it contends, in very general terms, that it does not do business within the jurisdiction of the Western District of Washington, and, particularly, that it does not maintain any agent in the State of Washington. The affidavit is drawn entirely in terms of conclusions of law, rather than statements of fact, but it is the basis upon which the motion to dismiss was granted.

The appellants contend that the allegations of their second amended complaint, charging that Red Wing participated in the conspiracy to maintain and fix prices and to allot markets, together with the facts set forth above, are more than sufficient, at this stage of the proceedings, to defeat a motion to dismiss the action based upon improperly laid venue.

### ***C. Co-Conspirator Doctrine***

In addition to the foregoing, the trial court could have determined that venue was properly laid in the Western District of Washington based upon the co-conspirator doctrine which has previously been enunciated by this court.

In *Guisti v. Pyrotechnic Industries, Inc.*, 156 F.2d 351 (9th Cir., 1946), *cert. den.*, *Triumph Explosives v. Guisti*, 329 U.S. 787 (1946), the court expressly stated in reference to substituted service of process on the California Secretary of State, where the co-conspirator resided outside the state:

“The California members of the conspiracy were agents of Triumph and the conspiracy’s attempt to destroy appellant’s business. Triumph was in Cali-



ifornia acting through such agents, just as it would have been if it had employed a group of agents there continuously. . . ." (p. 352)

Subsequently, in *DeGolia v. Twentieth-Century Fox Film Corp.*, 140 F. Supp. 316 (1954), the trial court was quite explicit in its avowal of the co-conspiracy doctrine:

"The defendants base their motions on the contention that they are not inhabitants of California, nor are or ever have been transacting business in this State. Plaintiff, on the other hand, while admitting that defendants are not inhabitants of California, nor are authorized to do business here personally, alleges that defendants do business in the State through the agency of their local co-conspirators. If the conspiracy is established, defendants are doing business in this State." (p. 317)

The court in the *DeGolia* decision went on to say that *Guisti* established the law of the Ninth Circuit.

## II. Service of Process

The appellants obtained service on Red Wing Peat Corporation by serving it at company offices in the State of Ohio. (Marshal's Return of Service—Document 26). Rule 4(e) of the Federal Rules of Civil Procedure provides:

"(e) Same: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. *Whenever a statute or rule of court of the state in which the District Court is held provides (1) for*



*service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."*

In connection with the foregoing rule, the service statutes of the State of Washington (Revised Code of Washington, Section 4.28.185) provide:

"4.28.185. Personal service out of state—Acts submitting person to jurisdiction of courts—Saving. (1) Any person, whether or not a citizen or resident of this state who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

"(a) The transaction of any business within this state; . . ."

This statute further provides that service of process may be made by personally serving the individual outside the state.

Section 4.28.185 of the Washington statutes is commonly referred to as the "Long Arm" statute and statute or statutes which are the same or similar in substance are continually in use throughout the United States both in state and federal courts.

The rules concerning service of process are not designed to provide technical and legalistic barriers to the institution of suits for damage where one has been injured. Their purpose is to provide notice to the party being sued, in sufficient detail and by a method sufficient-

ly timely and fair, to enable the defendant to appear and present a defense. See *Fooshee v. Interstate Vending Co.*, 234 Fed. Supp. 44 (D.C. Kan. 1964); *Grooms v. Greyhound Corp.*, 287 F.2d 95 (6 Cir. 1961); *Tarbox v. Walters*, 192 Fed. Supp. 816 (D.C. Pa. 1961). That purpose has been accomplished in this case. As indicated in decisions discussed earlier in this memorandum, once venue has been established, then the right to bring the action in the selected district is also established, and the rules relating to service of process are of minor importance provided that they adequately inform the defendant of the nature of the action and the fact that he is being sued so that he may appear and submit his defense.

It is anticipated that appellee may contend that Section 12 of the Clayton Act somehow limits or repeals the operation of the Federal Rules of Civil Procedure insofar as service of summons in antitrust cases is concerned. Such is not the case. In *Metropolitan Sanitary District of Greater Chicago v. General Electric Co.*, 208 Fed. Supp. 943 (D.C. Ill. 1962), it was specifically held that service as provided by the Federal Rules of Civil Procedure was proper in an antitrust case and approved service of summons in the method provided for by the law of the State of Illinois. Other antitrust decisions have also approved use of state statutes as a method of service of summons. See, for example: *Maternity Trousseau, Inc. v. Maternity Mart of Baltimore, Inc.*, 196 Fed. Supp. 456 (D.C. Md. 1961); *Crawford Transport Co. v. Chrysler Corp.*, 191 Fed. Supp. 223 (D.C. Ky. 1961); *Fooshee v. Interstate Vending Co.*, 234 Fed. Supp. 44 (D.C. Kan. 1964); *Massey-Ferguson Ltd. v. Intermountain Ford Tractor Sales Co.*, 325 F.2d 713 (10 Cir. 1962).



**CONCLUSION**

Appellants believe that at this juncture, prior to any discovery in this case, the court must reverse the trial court and deny the motion of Red Wing Peat Corporation to dismiss. The facts as now established are that Red Wing formed "New Western" for the purpose of exercising its option to purchase the assets of "Old Western" and that from and after the date of that acquisition it has used "New Western," its wholly owned subsidiary, as the vehicle for collusion, price-fixing and market allocation among the Canadian producers. As a *prima facie* case, this is more than sufficient. The motion should be denied without prejudice to appellee's right to renew it after pretrial discovery has been completed.

Respectfully submitted,

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**CERTIFICATE**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

THOMAS J. GREENAN

*Of Attorneys for Appellant*





No. 21749

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IN THE  
United States Court of Appeals  
For the Ninth Circuit

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SHIBO HAYASHI, an individual; and SHIBO HAYASHI,  
SHIZUYE OKIMOTO and FUGIO OKIMOTO, individuals  
d/b/a GREAT NORTHERN PEAT COMPANY,  
*Appellants,*

v.

RED WING PEAT CORPORATION,  
a Texas Corporation,  
*Appellee,*  
and

SUNSHINE GARDEN PRODUCTS, INC., a California Corporation;  
WILSON & MEYER & Co., a Nevada Corporation; WESTERN  
PEAT COMPANY, LTD., a Canadian Corporation; LULU  
ISLAND PEAT MOSS COMPANY, LTD., a Canadian Corpora-  
tion; MEADOWLAND FARMS, LTD., a Canadian Corporation;  
WESTERN PEAT MOSS, LTD., a Canadian Corporation;  
NORTHERN PEAT MOSS, LTD., a Canadian Corporation; and  
RICHMOND PEAT MOSS, LTD., a Canadian Corporation,  
*Defendants.*

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APPEAL FROM UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

HONORABLE WILLIAM J. LINDBERG, *Chief Judge*

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**BRIEF OF APPELLEE**

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IN THE  
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*Appellants,*

v.

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and

SUNSHINE GARDEN PRODUCTS, INC., a California Corporation;  
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APPEAL FROM UNITED STATES DISTRICT COURT FOR THE  
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HONORABLE WILLIAM J. LINDBERG, *Chief Judge*

---

**BRIEF OF APPELLEE**

---

**COUNTERSTATEMENT OF THE CASE**

The trial court dismissed Red Wing Peat Corporation (hereinafter called "Red Wing") upon a finding that venue as to this defendant was improperly laid in the Western District of Washington (Document 67). The issue raised by appellants is whether Red Wing, which

admittedly does not transact any business in the State of Washington, may be sued there solely on the basis that a subsidiary corporation transacts business within the state and there is a common officer between the parent and subsidiary corporations.

The essential allegations of the appellants' Second Amended Complaint may be summarized as follows: (1) eight defendant peat producers located in British Columbia, Canada are alleged to be the dominant processors of peat in that province; (2) allegations are made concerning their methods of selling peat in Canada, and its eventual distribution and sale in the western states of the United States—and particularly the State of Washington—during the period from 1953 to 1965, which methods are asserted to be in violation of the anti-trust laws of this country; and (3) plaintiffs allege injury to their peat business in the State of Washington (Document 11).

Defendant Western Peat Moss Ltd. (referred to as "New Western")—a Canadian corporation and a subsidiary of Red Wing (Document 57, p. 4)—is made a defendant on the basis of allegations concerning its status as a British Columbia peat producer, allegations concerning purchases from other defendant British Columbia peat producers, and allegations concerning its sale of peat in the State of Washington (Documents 11, 44). New Western is before the court as a defendant, along with the seven other Canadian peat producers.

Red Wing—the party dismissed—was not a party in the original complaint but was added as a party defendant on the basis of allegations concerning its ownership of



the stock of New Western since 1963 (Document 11, p. 9).

It is uncontroverted that Red Wing: (1) is a Texas corporation; (2) has as its only places of business, its headquarters in Sylvania, Ohio and its peat production facilities in Cromwell, Minnesota; (3) has never produced, sold, purchased, or contracted to purchase or sell any peat, peat moss or related or unrelated products of any kind in the State of Washington; (4) has never shipped or caused to be shipped any product into or from the State of Washington; (5) has never been licensed, authorized or qualified to carry on business within the State of Washington; (6) has never had any statutory agent of any kind or character within the State of Washington; (7) has never owned or leased any property, real or personal, within the State of Washington or received income from any source within said state; (8) has never maintained any office or place of business of any kind, telephone listing or mailing address within the State of Washington; (9) has no director, officer, shareholder, employee or agent that resides or works in the State of Washington; and (10) has never had any officer, director, shareholder, employee or agent present in the State of Washington for the purpose of transacting any business of any kind for or on behalf of Red Wing (Document 57, pp. 1-4). It is also undisputed that none of the other defendants own any stock or other financial interest in Red Wing (Document 57, p. 4).

Conversely, there has been no allegation, whether by complaint or affidavit, that Red Wing is in any way (1) a producer of peat in British Columbia, (2) itself participating in any of the alleged peat purchase and sale trans-

actions or other arrangements complained of, or (3) integrating its corporate activities with the alleged transactions complained of. Indeed, the appellants' detailed allegations concerning the transactions complained of negate any participation by Red Wing (Documents 11, 44; App. Brief, pp. 2-5).

There are two facts upon which appellants seek to lay venue against Red Wing in the Western District of Washington:

(1) New Western is a subsidiary of Red Wing; and

(2) Mr. John Dunfield is president of both Red Wing and New Western, and Mr. John Fleming, who is alleged to have participated in certain transactions on behalf of New Western, is also one of the Assistant Secretary-Treasurers of Red Wing. (Memorandum Opinion, Document 72, p. 3; App. Brief, p. 16; Document 57, p. 2; Document 61.)<sup>1</sup>

## ARGUMENT

The only issue before this court is whether or not venue may be properly laid against Red Wing in the Western District of Washington. The validity of the service of process upon Red Wing<sup>2</sup> in Ohio (Document 26) is in issue only upon the basis that Congress has made the laying of proper venue a prerequisite to the validity of

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1. Appellants' assertion (App. Brief, pp. 5-6) that Mr. Fleming appeared before the United States Tariff Commission on behalf of both Red Wing and New Western not only adds nothing to these factors, but is totally inaccurate and refuted by their attachment to their own affidavit (attachment, Document 61).

2. The motions of Lulu Island Peat Company, Ltd., Coast Peat Company, Ltd., and Blundell Peat Company, Ltd., which are not presently before this court do involve an additional issue of the validity of extra-territorial service where it is made in a foreign country (Document 35).



such extra-territorial service. *Goldlawr, Inc. v. Heiman*, 288 F.2d 579 (2d Cir., 1961).

### A. Burden of Proof

It is clear that after challenge, as here, the burden of proving proper venue rests upon the plaintiff. *Bruner v. Republic Acceptance Corp.*, 191 F. Supp. 200 (D.C. Ark., 1961); *Wentling v. Popular Science Publishing Co.*, 176 F. Supp. 652 (D.C. Pa., 1959).

### B. The Standards for Determining Venue and Their Application to Red Wing

While Congress liberalized the venue provisions for private anti-trust treble damage actions (15 U.S.C.A. §§ 15, 22) it was unwilling to give private plaintiffs an unlimited choice of forums. *United States v. National City Lines, Inc.*, 334 U.S. 573, 92 L.Ed. 1584 (1948). Congress also withheld from private plaintiffs the broad power to join defendants without regard to venue, which power *was granted* to the federal government in certain proceedings (15 U.S.C.A. § 25).<sup>3</sup> Thus, the United

3. "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof." 15 U.S.C.A. §25.



States Supreme Court has readily recognized that a plaintiff in a private treble damage action must prove proper venue as to each defendant within the express terms of the antitrust venue provisions.

“Congress therefore was not indifferent to possibilities of abuse involved in the various proposals for change. Exactly the opposite was true. For the broader proposals were not rejected because they gave the plaintiff the choice. They were rejected because the choice given was too wide, giving plaintiffs the power to bring suit and force trial in districts far removed from the places where the company was incorporated, had its headquarters, or carried on its business. *In adopting § 12 Congress was not willing to give plaintiffs free rein to haul defendants hither and yon at their caprice.* 51 Cong. Rec. 9466, 9467. But neither was it willing to allow defendants to hamper or defeat effective enforcement by claiming immunity to suit in the districts where by a course of conduct they had violated the Act with the resulting outlawed consequences. In framing § 12 to include those districts at the plaintiffs’ election, Congress thus had in mind not only their convenience but also the defendant company’s inconvenience, and fixed the limits within which each could claim advantage in venue and beyond which neither could seek it. . . .” *United States v. National City Lines, Inc.*, 334 U.S. 573 at 587-588, 92 L.Ed. 1584 at 1593 (1948). (Emphasis supplied)

“. . . Congress by 15 U.S.C. § 15 placed definite limits on venue in treble damage actions.” *Banker’s Life & Cas. Co. v. Holland*, 346 U.S. 379 at 384, 98 L.Ed. 106 at 112 (1953).

Section 4 of the Clayton Act (15 U.S.C.A. § 15)<sup>4</sup> pro-

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4. “Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 15 U.S.C.A. § 15.

vides that venue in a suit against an individual may be laid in any district where the defendant:

- (a) resides;
- (b) is found; or
- (c) has an agent.

Section 12 of the Clayton Act (15 U.S.C.A. § 22)<sup>5</sup> provides that venue in a suit against a corporation may be laid in any district where the corporation:

- (a) has its place of inhabitancy;
- (b) is found; or
- (c) "transacts business."

It is clear from the affidavit of Mr. Trott (Document 57), and undisputed by appellants, that Red Wing is not an inhabitant of nor does it reside in the Western District of the State of Washington.

It is equally clear from Mr. Trott's affidavit (Document 57) that Red Wing itself is not found in, has no agent in, and transacts no business within the Western District of the State of Washington. Appellants do not dispute this, but contend that Red Wing is transacting business<sup>6</sup>

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5. "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." 15 U.S.C.A. §22.

6. The concept of transacting business is more encompassing than that of being "found" and under the circumstances of this case it is obvious that Red Wing could not be "found" within the district if it is not transacting business therein. 1 Moore, *Fed. Prac.*, par. 0.144 [15] at 1668 (2d ed. 1964); *Goldlawr, Inc. v. Shubert*, 169 F. Supp. 677 (D.C. Pa., 1958).



within the district by virtue of its parent-subsidary relationship with New Western which is doing so, and by virtue of the so-called “co-conspirator theory.”

**1. *Red Wing Is Not Transacting Business Within the District By Virtue of Its Parent-Subsidiary Relationship With New Western.***

The decisions uniformly establish that the words “transacts business” in Section 12 of the Clayton Act contemplate and require that a defendant be carrying on business of a substantial and continuing character in the particular judicial district where venue is attempted to be laid. This was firmly established by the United States Supreme Court in *United States v. Scophony Corp. of America*, 333 U.S. 795, 92 L.Ed. 1091 (1948), wherein the court stated:

“This construction gave the words ‘transacts business’ a much broader meaning for establishing venue than the concept of ‘carrying on business’ denoted by ‘found’ under the pre-existing statute and decisions. The scope of the addition was indicated by the statement ‘that a corporation is engaged in transacting business in a district . . . if *in fact, in the ordinary and usual sense*, it “transacts business” therein *of any substantial character.*’ Id. 273 U.S. at 373, 71 L.Ed. 689, 47 S. Ct. 400.

“In other words, for venue purposes, the court sloughed off the highly technical distinctions theretofore glossed upon ‘found’ for filling that term with particularized meaning, or emptying it, under the translation of ‘carrying on business.’ In their stead it substituted the practical and broader business conception of engaging in any substantial business operations. . . . The practical every day business or commercial concept of doing or carrying on business ‘of any substantial character’ became the test of venue.” 333 U.S. at 807, 92 L.Ed. at 1100.



See also, for example, *Bruner v. Republic Acceptance Corp.*, 191 F. Supp. 200 (D.C. Ark. 1961), wherein the court stated at page 203:

“But, although the statute is to be given a liberal construction, it does not go so far as to permit venue to be predicated upon any corporate contacts with the foreign district, regardless of how slight, minimal, or sporadic those contacts may be. *The business transacted must be of substantial character, and it must have some degree of continuity.* Mere isolated or sporadic contacts are not sufficient . . . And, when venue is challenged by a defendant, the burden of proof is upon the plaintiff.” (Emphasis added)

It has also been long established that a parent-wholly owned subsidiary relationship, even with common officers, does not establish that the parent corporation is transacting business in a state merely because the subsidiary is doing so. The parent corporation will be held to be transacting business in the state only when it is established that the separation of corporate activities between the parent and subsidiary was purely fictional. *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333, 69 L.Ed. 634 (1925).

*Terry Carpenter, Ltd. v. Ideal Cement*, 117 F. Supp. 441 (D.C. Neb. 1954), contains an excellent discussion of the authorities on this issue. In that case the plaintiff sought to lay venue against a parent corporation by showing the parent-wholly owned subsidiary relationship, common officers and common interlocking directorates. Chief Judge Donohoe held that such a showing was insufficient to establish venue as to the parent corporation even though the subsidiary was transacting business with-

in the state. See also: *Lawlor v. National Screen Service Corporation*, 10 F.R.D. 123 (D.C. Pa. 1950); *Anderson v. British Overseas Airways Corp.*, 144 F. Supp. 543 (S.D., N.Y. 1956).

Appellants' brief does not challenge the validity and correctness of these decisions and the standards they establish. Indeed, appellants' brief presents no legal argument or authorities specifically in support of their attempt to establish venue on the basis of the parent-subsidiary relationship.

*Intermountain Ford Tractor Sales Company v. Massey-Ferguson, Ltd.*, 210 F. Supp. 930 (D.C. Utah, 1962) *aff'd per curiam*, 325 F.2d 713 (10th Cir., 1963), relied upon by appellants before the trial court (Document 63), also recognized the full force of these standards and permitted venue to be laid against the parent corporation only upon the basis that the plaintiff had demonstrated that the separate identities of the corporations had been destroyed by superimposing on the corporations a separate controlling entity, which the court described as follows:

“ . . . This ‘North American Operations’ appears to be not merely a council of officers from the respective corporations, each acting in separate capacities and with respect only to the particular corporation which he represents, but essentially another entity in which separate corporate functions are merged in many respects, employing as such numerous assistants and employees and often acting directly with subsidiary corporate activities rather than through the top management of the respective corporations. . . . ” 210 F. Supp. at 935.

The court, therefore, concluded:

*“I am not unmindful that common officers and di-*



*rectors ordinarily may not be regarded as demonstrating an unacceptable commingling of operations.* But here they do not function at separate times and under separate circumstances with regard to the respective businesses. On the contrary, by the device of the North American Operations, common officers of both meet together at a higher echelon to afford common direction to all North American Operations of the company, and to lay down detailed instructions concerning the operation of company stores. . . .”  
210 F. Supp. at 937. (Emphasis supplied)

The only facts presented by the appellants to justify laying venue against Red Wing in the Western District of Washington are the parent-subsidary relationship and the existence of a common officer. In February, 1964, appellants took the exhaustive statement of Mr. Bell, upon which they rely so heavily, and subsequently have filed an original and two amended complaints of detailed nature and at least two affidavits (Documents 44, 1, 3, 11, 61). Throughout these numerous documents covering a period of three years, Red Wing is either not mentioned at all or is referred to in factual allegations only with reference to the establishment and existence of its subsidiary and the existence of a common officer. There have been no factual allegations that Red Wing is a British Columbia peat producer, is itself participating in any of the alleged transactions complained of, has itself performed any act or transacted any business within the district, or that the separate identities of the corporations and their operations have been merged. Indeed, the factual allegations the appellant have made negate any participation by Red Wing in the matters complained of.

Appellants also cite a number of cases where the decision on venue was stayed pending further discovery. It



should be recognized, of course, that in regard to these cases:

(1) It has been recognized that such action is a matter of discretion with the trial court.

“ . . . There being no statute or rule directing the procedure to be followed in determining whether the prerequisites to jurisdiction and venue exist, the manner in which such determination should be made is left to the discretion of the trial judge. *Gibbs v. Buck*, 307 U.S. 66, 59 S. Ct. 725, 83 L.Ed. 1111 (1939); *Kantor v. Comet Press Books Corporation*, D.C., 187 F. Supp. 321 (1960). . . .” *Ziegler Chemical & Mineral Corp. v. Standard Oil Co. of Cal.*, 32 F.R.D. 241 at 243 (N.D. Cal. 1962).

(2) The trial courts have exercised their discretion in terms of specific factual allegations relating to venue, which indicated a probability that venue exists. See for example: *Ferraioli v. Cantor*, 259 F. Supp. 842 (S.D. N.Y., 1966). Compare the various treatments given the numerous motions to dismiss in *School District of Philadelphia v. Kurtz Bros.*, 240 F. Supp. 361 (E.D. Pa., 1965), where the motion to dismiss as to the defendant brought in on the basis of a parent-subsidary relationship was granted without further opportunity for discovery.

(3) In temporarily delaying a venue determination, the courts have expressly limited the intervening discovery to matters relating to venue. In the present case, however, the appellants had previously disavowed any desire to have further discovery which is limited to venue matters (Document 74, Reporter's Transcript, June 3, 1966, p. 50).

In view of (1) the clear and unequivocal statements in Mr. Trott's affidavit, (2) the absence of specific factual

allegations or statements concerning Red Wing, (3) the reasonable implications of the specific factual allegations made by the appellants and contained in their supporting statement from Mr. Bell, and (4) the attitude of appellants toward discovery limited to ascertaining venue, it certainly cannot be said that the trial court abused its discretion in determining the issue of venue. It must be remembered that the venue requirements are intended to be a *prerequisite* to a plaintiff's ability to bring a defendant before the forum—particularly by extra-territorial service.

## 2. The “Co-Conspirator Theory” of Venue.

While the appellants raised the issue of the so-called “co-conspirator theory” in response to motions to dismiss by other defendants who were alleged to be direct conspirators (Document 43), appellants did not argue this theory to the trial court in connection with Red Wing's motion to dismiss (Document 74, Reporter's Transcript, October 28, 1966, pp. 1-26; Documents 60, 63).

This is due to the fact that appellants' factual allegations only assert an alleged conspiracy between other defendants and New Western, Red Wing's subsidiary. Appellants sought venue over Red Wing on the basis of the parent-subsidary relationship between Red Wing and New Western rather than on any allegation of corporate participation in a conspiracy by Red Wing—and it was on this parent-subsidary relationship that Red Wing's motion to dismiss was resisted and argued (Documents 60, 63; Document 74, Reporter's Transcript, October 28, 1966, pp. 1-26). It is submitted, therefore, that appellants have



not adequately raised this issue below in connection with Red Wing's motion to dismiss, so as to be entitled to raise it now on appeal.

In the event that this court should determine that the appellants by some implication below preserved this issue so that it is now before this court, appellee challenges the validity of the so-called "co-conspirator theory" and its extension to a defendant that has been joined solely on the basis of its parent-subsidary relationship with an alleged co-conspirator.

The background of the "co-conspirator theory" dates back to a *dictum* statement in *Guisti v. Pyrotechnic Industries, Inc.*, 156 F.2d 351 (9th Cir. 1946).<sup>7</sup>

In the *Guisti* case, the plaintiff, who was engaged in the business of buying and selling fireworks in California, sued Triumph, a Delaware corporation engaged in the manufacture of fireworks, and a number of other fireworks manufacturers. It was alleged that Triumph and the others conspired to organize an association for the purpose of controlling the sale of fireworks. The association met in California and within six months apparently succeeded in blacklisting the plaintiff. Triumph *later* qualified to do business in California and, after having conducted routine business there for several years, with-

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7. Prior to this decision the theory had been rejected in *Hansen Packing Co. v. Armour & Co.*, 16 F. Supp. 784 (S.D. N.Y., 1936), and *Westor Theatres, Inc. v. Warner Bros. Pictures, Inc.*, 41 F. Supp. 757 (D.C. N.J., 1941).

The language of the opinion in the recent case of *American Concrete Agricultural Pipe Ass'n v. No-Joint Concrete Pipe Co.*, 331 F.2d 706 (9th Cir., 1964), suggests that this court has recognized the need for a reconsideration of its dictum comments in the *Guisti* case and the implication that have developed as a result of lower court interpretations of those comments.



drew from the state, and pursuant to the California statutes, filed a certificate of withdrawal from intra-state business which provided *inter alia*, that Triumph consented to service on the Secretary of State in any action upon any liability incurred in California prior to its withdrawal.

This court, dealing solely with the issue of the validity of the service on the Secretary of State under the California statute, upheld the service, reasoning that the activities of the co-conspirators in California amounted to intra-state business within the meaning of the statute, and that the California members of the conspiracy were agents of Triumph so that Triumph was in California acting through such agents just as it would have been if it had employed a group of agents there continuously to underbid on sales to appellant's customers. *Although this court indicated without reservation that the venue question was not in issue but was moot since Triumph had waived venue by creating an agent in the state to accept service of process*, the court's comment that local members of a conspiracy are agents of non-resident members gave illegitimate birth to the co-conspirator theory of venue under the federal antitrust laws.

The co-conspirator venue concept came under sharp attack in *Banker's Life & Cas. Co. v. Holland*, 346 U.S. 379, 98 L.Ed. 106 (1953). While the actual holding in *Banker's* was restricted to a ruling that mandamus did not lie, the court discussed the question of whether venue as to a non-resident defendant was properly laid in Florida on the strength of an allegation of conspiracy between the non-resident and his co-conspirators who did reside

in Florida. In discussing this question, the majority noted:

“ . . . While a criminal action under the antitrust laws lies in any district where the conspiracy was formed or in part carried on or where an overt act was committed in furtherance thereof, Congress by 15 U.S.C. § 15 placed definite limits on venue in treble damage actions. Certainly Congress realized in so doing that many such cases would not lie in one district as to all defendants unless venue was waived. It must therefore have contemplated that proceedings might be severed and transferred or filed in separate districts originally. Thus, petitioner’s theory has all the earmarks of a frivolous albeit ingenious attempt to expand the statute.” 346 U.S. at 383, 98 L.Ed. at 112.

In a separate opinion, the other three justices similarly criticized the theory and stated:

“The only basis, on the record before us, for the claim that § 4 subjected the Georgia commissioner to suit is a suggestion that since the complaint charges a conspiracy between him and co-conspirators who reside in the southern district of Florida, the latter thereby became his ‘agents’ within the meaning of § 4 of the Clayton Act. The court now characterizes this contention as ‘frivolous.’ . . .

“If we now had to decide whether a co-conspirator as such is an ‘agent’ for purposes of venue under 15 U.S.C. § 15, it cannot be doubted that we would have to conclude that the district judge was right in finding that the Georgia commissioner could not be kept in the suit.” 346 U.S. at 385-386, 98 L.Ed. at 113.

Following the *Banker’s* decision, numerous courts have rejected a “co-conspirator theory” of venue:

*Bertha Bldg. Corp. v. National Theatres Corp.*, 248 F.2d 833 (2d Cir., 1957) cert. denied 356 U.S. 936 (1958);



- Goldlawr, Inc. v. Shubert*, 169 F. Supp. 677 (D.C. Pa., 1958) aff'd 276 F.2d 614 (3rd Cir., 1960);
- Intermountain Ford Tractor Sales Co. v. Massey-Ferguson, Ltd.*, 210 F. Supp. 930 (D.C. Utah, 1962) aff'd *per curiam*, 325 F.2d 713 (10th Cir., 1963);
- Independent Productions Corp. v. Loew's, Inc.*, 148 F. Supp. 460 (S.D. N.Y., 1957);
- Commonwealth Edison Co. v. Fed. Pac. Elec. Co.*, 208 F. Supp. 936 (N.D. Ill., 1962);
- Interamerican Refining Corp. v. Superior Oil Co.*, 224 F. Supp. 35 (S.D. N.Y., 1963);
- Bruner v. Republic Acceptance Corp.*, 191 F. Supp., 200 (D.C. Ark., 1961);
- McManus v. Capital Airlines*, 166 F. Supp., 301 (E.D. N.Y., 1958);
- Periodical Distributors, Inc. v. American News Co.*, C.C.H. Trade Reg. Serv. par. 70,011 (S.D. N.Y., 1961);
- Ohio-Midland Light & Power Co. v. Ohio Brass Co.*, C.C.H. Trade Reg. Serv. par. 78, 773 (S.D. Ohio, 1962).

The small minority of District Courts that have given some credence to the "co-conspirator theory" since the decision in the *Banker's* case have been almost entirely within the Ninth Circuit. These courts have done this loyally, if very reluctantly, in the belief that it represents the law, or at least the wishes, of this court. *Haliewa Theatre Co. v. Forman*, 37 F.R.D. 62 (D.C. Haw., 1965). It is time that this court corrected this minority interpretation of the *Guisti* dictum and indicated its adherence to the statutory terms of the venue provisions and the unanimous view of the United States Supreme Court in the *Banker's* decision.



While there is no doubt that Congress liberalized the venue provisions of the antitrust laws in order to relieve injured parties from the often insuperable obstacle of resorting to distant forums for redress of wrongs done in the places of their business or residence, Congress did not intend thereby to "give plaintiffs free reign to haul defendants hither and yon at their caprice." *United States v. National City Lines*, 334 U.S. 573, 92 L.Ed. 1584. This is apparent from the fact that Congress, while explicitly granting the power to the federal government to bring all conspirators into the same forum regardless of venue (15 U.S.C.A. § 25), withheld the same power from private plaintiffs. As the court indicated in *Hansen Packing Co. v. Armour & Co., Inc.*, 16 F. Supp. 784 at 787 (S.D. N.Y. 1936) "the failure of Congress to make similar provisions for civil suits by private litigants implies an intent to withhold the privilege."

To permit venue as to all defendants on the basis of an allegation of conspiracy, which is usually found in the typical antitrust complaint in any event, goes beyond the congressional purpose and grants to the private plaintiff virtually unlimited power to bring his action in the forum of his choice since a number of different forums are generally available for venue purposes for each of many defendants. This result not only ignores the fact that Congress withheld such power from private antitrust plaintiffs, but also ignores the fact that Congress established detailed venue provisions separately applicable to each defendant. By ignoring the individual applicability of these venue provisions, the chances of a given defendant successfully defeating venue in a conspiracy case are abol-

ished, since, if the question of venue as to a given defendant abides the final determination of the existence of a conspiracy, it will only be after a full trial on the merits that the question can be resolved. At that point, the question of venue is totally submerged in the final judgment on liability, and even if a particular defendant played no part whatsoever in the conspiracy alleged, he has been denied the protection of the venue provisions—protection that Congress intended that the defendant have as a safeguard against abuse and as a part of the balancing of conveniences between plaintiffs and defendants. This is even more obvious in the instant case where Red Wing is involved as a defendant solely on the basis of its parent-subsidary relationship with an alleged conspirator.

It is submitted that until Congress revises the venue provisions of the antitrust laws, venue as to each and every defendant in an antitrust action must be separately established, for in no other way can the congressional dictates on venue be satisfied. The so-called “co-conspirator theory” of venue, which has been repudiated by the U.S. Supreme Court, the Second Circuit Court of Appeals and many other courts, must be rejected.

### **C. Service of Process**

Service of process is not a real issue in this case. The issue is venue. If proper venue had been established there would be no dispute about service. Since proper venue has not been established, appellants have failed to establish a prerequisite to the validity of the service in another state. *Goldlawr, Inc. v. Heiman*, 288 F.2d 579 (2d Cir., 1961). Furthermore, if the plaintiffs have



not established venue under the "transacts business" provisions of 15 U.S.C.A. § 22, they certainly have not met the "transaction of any business" requirement of Section 4.28.185 of the Revised Code of Washington, which the Washington Supreme Court has interpreted to require:

" . . . there are three basic factors which must coincide if jurisdiction is to be entertained. Such would appear to be: (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation." *Tyee Constr. Co. v. Dulien Steel*, 62 Wn.2d 106 at 115-116, 381 P.2d 245 (1963).



## CONCLUSION

The plaintiffs have failed to establish proper venue in the Western District of Washington as to Red Wing and the trial court properly, and without any abuse of its discretion, granted Red Wing's motion to dismiss. The trial court should be affirmed.

Respectfully submitted,

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## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT W. GRAHAM

*Of Attorneys for Appellee*



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IN THE  
United States Court of Appeals  
FOR THE NINTH CIRCUIT

MARCO ANTONIO LOPEZ-HERNANDEZ,  
*Appellant,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

NO. 21,750 ✓

On Appeal from the Judgment of  
The United States District Court  
For the District of Arizona

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BRIEF FOR APPELLEE

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FILED

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

MARCO ANTONIO LOPEZ-HERNANDEZ,  
*Appellant,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

} NO. 21,750

On Appeal from the Judgment of  
The United States District Court  
For the District of Arizona

**BRIEF FOR APPELLEE**

**I.  
JURISDICTIONAL STATEMENT OF FACTS**

This prosecution was begun by the return of an Indictment by the Federal Grand Jury sitting at Phoenix, Arizona, on July 19, 1966, charging Marco Antonio Lopez-Hernandez with a violation of 21 U.S.C. §174 in that on or about the 19th day of June, 1966, within the District of Arizona he did fraudulently and knowingly import and caused to be imported and brought into the United States of America from the United States of Mexico, near Nogales, Arizona, approximately 246.6 grams of heroin, a narcotic drug (Record of the Ap-

peal, Item 1). (Hereinafter the Record of the Appeal will be referred to as "RC", the Reporter's Transcript of the Proceedings will be referred to as "RT", the number following RT will refer to the page and the number following "L" will refer to the line; appellant Marco Antonio Lopez-Hernandez will be referred to as Lopez-Hernandez).

On July 25, 1966, Lopez-Hernandez was appointed counsel and was arraigned and pleaded not guilty (RC Item 2).

Trial was set for September 21, 1966, and on that date, September 21, 1966, Lopez-Hernandez by his counsel made an oral motion for a 18 U.S.C. §4244 hearing which was granted. The Government was directed to prepare the Order appointing the expert witness which was entered on September 22, 1966 (RC Item 3).

Lopez-Hernandez filed opposition to the form of the order on September 29, 1966 (RC Item 4).

On October 31, 1966, the Report of the psychiatric examination was filed (RC Item 6).

Trial was re-set for November 17, 1966, and trial was held on November 17 and 18, 1966, the Honorable William P. Gray presiding (RC Item 7 & 8). The jury returned a verdict of guilty (RC Item 8).

On December 27, 1966, a Judgment of conviction was entered, and Lopez-Hernandez was sentenced to seven years, provided five years are served and thereafter Lopez-Hernandez be eligible for parole (RC Item 13).

On January 6, 1967, Notice of Appeal was lodged (RC Item 17). On January 12, 1967, a Motion to Proceed in Forma Pauperis supported by affidavit was filed (RC Items 14 & 15) and on January 20, 1967, the Court entered an Order Granting Leave to Appeal in Forma Pauperis (RC Item 16). On the same day, the Notice of Appeal was filed (RC Item 17).

On March 21, 1967, an Amended Judgment and Commitment was filed reducing the sentence to five years (RC Item 23).

(On January 26, 1967, the Court had entered an Order permitting trial counsel to withdraw, RC Item 20).

This appeal was docketed on March 27, 1967. This Court has jurisdiction of the appeal under the provisions of 28 U.S.C. §1291.

## II.

### STATEMENT OF FACTS

On June 19, 1966, a Sunday, at about 1:45 a.m. Customs Agents Horace Cavitt and Charles Cameron, Customs Port Investigators Everett Turner and William Searcy with State Agents Leonard Heimer and Edward Cleveland went to a point approximately two miles west of Nogales, Arizona, along the International Boundary between Mexico and the United States, to a point where the International Boundary fence drops from a ten foot high cyclone fence to a four or five strand barbed wire fence (RT 10-11; 30-31;81).

At about 2:00 a.m. Customs Agent Henry Washington drove up and blinked his lights and got out of his car. Washington walked up towards the boundary (RT 12 L 3-6; 32 L 1-3). Washington met Lopez-Hernandez on the American side about 10 feet from the fence (RT 61 L 3-11). They spoke in English (RT 61 L 16-17). There were two men on the Mexican side and one other man who was with Washington on the American side (RT 61 L 25-to 62 L 3). Lopez-Hernandez asked Washington if he had the money (RT 62 L 13-20) and Washington replied, "Yes, I have \$5,000.00" (RT 62 L 20-21 and 63 L 3). ". . . and he said, Mr. Lopez then said, 'We have the best heroin in Mexico.' He said, 'It is eighty per cent pure and at \$500 an ounce it is a bargain.' I then said, 'There is no heroin in Mexico eighty per cent pure.' And then Mr. Lopez laughed and he said, 'You Americans never believe us Mexicans.' And then he said, Mr. Lopez, the defendant said, 'Let's go see the money'" (RT 63



L 3-9). They walked back to Washington's car (RT 12 L 17-20; 32 L 9-11; 63 L 9-10). Washington entered the car, obtained the money from the glove compartment, showed the money to Lopez-Hernandez, returned the money to the glove compartment and locked it (RT 63 L 10-12). They returned to the fence (RT 63 L 12-13; 12 L 20-22; 32 L 18-20). Lopez-Hernandez entered Mexico and spoke to one of the men a few minutes and then came back across the fence (RT 63 L 13-15). A man on the other side said, "Let's see some action" (RT 63 L 16). Then Lopez-Hernandez said, "If you try anything, I have some men up here on the hill" and he pointed towards Mexico, "with guns and they will take care of you" (RT 63 L 17-19). Then Lopez-Hernandez showed Washington a small contraceptive which he opened and had Washington smell it (RT 63 L 20-21). Lopez-Hernandez then tied it back up and they started walking toward the car (RT 63 L 21-23).

In about twenty yards, a twig snapped and Lopez-Hernandez turned his head; a light hit them (RT 63 L 23-25), Washington saw Lopez-Hernandez throw the contraceptive he was holding in his left hand and start running (RT 63 L 25 to 64 L 2). Washington then saw Lopez-Hernandez reach into his right pocket as he was running but Turner's body, who started running after Lopez-Hernandez, got between Lopez-Hernandez and Washington, and Washington could not see any more (RT 64 L 6-10). Cavitt ran to head Lopez-Hernandez off at the fence while Turner directly pursued him (RT 13 L 18-22; L 18 and 34 L 2). Turner tackled Lopez-Hernandez and when Turner picked up Lopez-Hernandez, Turner found an eight or ten inch steak knife under Lopez-Hernandez, which was Government's Exhibit 4 (RT 34 L 9-13). Turner then took Lopez-Hernandez back to Cameron and went to look for the package (RT 34 L 1-4) which Turner had seen him throw to his right after 2 or 3 steps (RT 33 L 24-25; 82 L 12-18 and 46 L 3-4). Turner saw Heimer find

it and took immediate possession of it (RT 37 L 17-19). The package, a plastic bag in Government's Exhibit 2, contained five rubber contraceptives (RT 37 L 15-19). While the agents searched for the package, Washington sat in the car with Lopez-Hernandez and the other man who was with him, and Lopez-Hernandez agreed to pretend the two were wet backs (RT 75 L 20 to 76 L 1).

The agents took Lopez-Hernandez to the office and Washington spoke to them and they went back to search the area where Lopez-Hernandez started running (RT 38, L 8-10). Turner found one single contraceptive (RT 38).

Government's Exhibit 2 consisted of the plastic bag containing five contraceptives and the single contraceptive contained a total of 9.2 ounces or 246.6 grams of heroin (RT 104-105). (The chain of custody from Turner on is not at issue and will not therefore be set out.)

Lopez-Hernandez testified he drove a taxi-cab for a living (RT 118). He testified he had entered the United States many times illegally (RT 119). Lopez-Hernandez testified a Mexican client, who preferred his services, was going to take him to Los Angeles (RT 120 L 15-20). Lopez-Hernandez had known him before in Los Angeles but had seen him in Nogales about a year (RT 121 L 8-9).

Lopez-Hernandez said the Mexican client told him not to bring luggage so that they would not be questioned (RT 121 L 16-20). Shortly after Lopez-Hernandez arrived, a Mexican arrived in a car on the Mexican side (RT 121 L 23-24). Then the Mexican client arrived on the American side in a car and the lights of the car blinked (RT 122). They walked up to the fence and began to discuss a business deal with the other Mexican, not Lopez-Hernandez (RT 123).

Lopez-Hernandez was asked to go check the money with his taxi-cab client (RT 124). Lopez-Hernandez denied selling marijuana or narcotics (RT 127 L 1-3) although he has sold oregano cigarettes to college students (RT 127 L 6-9). Lopez-



Hernandez stated that while they had been talking by the fence the others had talked about heroin and he, Lopez-Hernandez, was given one of the contraceptives to hold but yet he, Lopez-Hernandez, did not bring it with him into the United States (RT 128, L 3-8; 129 L 5-7). During this conversation Lopez-Hernandez stated the Mexican, who had arrived on the Mexican side, accused Washington and the taxicab client of trying to lure the Mexican into the United States (RT 128 L 12-14).

(Lopez-Hernandez therefore testified to only one trip away from the fence.) Lopez-Hernandez stated as he was walking towards the car the light flashed in his face and he started running and made flailing motions with his arms (RT 126 L 25 to 130 L 3).

Lopez-Hernandez stated he asked the person who caught him if he could take the knife out (RT 130 L 9-16) which Turner denied (RT 158 L 17-19).

On cross examination, Lopez-Hernandez denied asking Washington for the money (RT 138 L 21), denied being on the American side of the fence during this conversation (RT 139 L 1-2); denied handing Washington a rubber contraceptive and telling Washington it was 80% pure (RT 139 L 6-8). Lopez-Hernandez was then asked if he could recall his counsel's question about whether he had ever sold narcotics or marijuana to anyone and he did recall it (RT 139 L 9-14). Lopez-Hernandez was asked if he went up to Washington in Nogales, Sonora, Mexico about a week before his arrest and asked Washington if Washington wanted to buy marijuana, pills, heroin, see the girls, "anything you want I can get." (RT 139 L 15-18) and he denied ever making such an offer (RT 140 L 5. He was then asked if he made the same offer to Washington about six months before June 19 in Nogales, Sonora, Mexico (RT 140 L 6-7) and he denied it (RT 140 L 12).

Lopez-Hernandez denied stating to Washington not to



try anything because he had men on the Mexican side who would kill him )RT 140 L 20-22).

Lopez-Hernandez denied throwing away the rubber contraceptive (RT 142 L 16-19) and also denied throwing away the package with the five contraceptives (RT 142 L 22-25).

Washington in rebuttal testified that the first time he saw Lopez-Hernandez was about six months before Lopez-Hernandez was arrested (RT 144 L 9-11). Lopez-Hernandez approached him in Nogales, Sonora, Mexico in front of the Mexican Immigration Building and asked Washington where he was going and Washington ignored him; then Lopez-Hernandez repeated the question he denied asking on cross-examination, i.e. "Do you want to buy some marijuana, you want to buy some pills, you want to buy some heroin, you want to go see the girls, anything you want I have got it." (RT 144, L 20-25).

Washington next testified Lopez-Hernandez next spoke to Washington about a week before the arrest at the same place as before and made the same approach, i.e. do you want to buy marijuana, etc. (RT 145 L 5-20).

Washington testified Lopez-Hernandez was on the American side on June 19 when Washington first approached Lopez-Hernandez and the conversation took place on the American side (RT 145 L 21-24). When Washington opened the door to get the money to show Lopez-Hernandez the car light went on and he saw Lopez-Hernandez clearly (RT 146 L 17-19).

### **III.**

## **OPPOSITION TO SPECIFICATION OF ERRORS**

1. The District Court did not err in sustaining the Government's claim of privilege and the Government's objection as to timeliness on the revelation of the informant's identity.

2. The conviction under the indictment was sustained by the weight of the evidence.

#### **IV.**

### **SUMMARY OF ARGUMENT**

1. No real grounds were given for the revelation of the informant's identity, that is, revelation was not essential to a fair determination of the cause.

2. Although there was a motion for judgment of acquittal at the close of the Government's case, there was no motion for judgment of acquittal at the close of all the evidence and, therefore, the Appellant has no grounds to attack the sufficiency of the evidence.

#### **V.**

### **ARGUMENT**

**1. No real grounds were given for the revelation of the informant's identity, that is, the revelation was not essential to a fair determination of the cause.**

In discussing the evidence received at trial the Appellant reviews the evidence as if Appellant's testimony was the only evidence received as to the movements by the fence. Turner and Cavitt, as well as Washington testified to two trips to the fence area (RT 32; 12; 63). Lopez-Hernandez testified to only one trip by Washington to the fence area. (Please see Statement of Facts covering Lopez-Hernandez's testimony.)

Lopez-Hernandez was further impeached when he was asked on cross-examination if he had offered narcotics to Wash-

ington on two previous occasions and he denied it. Washington so testified. (Lopez-Hernandez had testified on direct examination that he had never sold narcotics to anyone, RT 127 L 1-3).

Furthermore, in Lopez-Hernandez's Opening Brief, Lopez-Hernandez takes out of context Washington's statement that he was going to take Lopez-Hernandez to Los Angeles. (See Opening Brief of Appellant, page 5 line 24 to page 6 line 1.) Washington testified that while the agents searched for the package, Washington, while purportedly under arrest, and Lopez-Hernandez agreed to a story that Lopez-Hernandez was a wet-back Washington was taking to Los Angeles. (RT 75 L20 to 76 L1; 78 L 12-17).

Obviously, the jury believed the testimony of Washington as to the conversations with him, and the two other agents' testimony as to the movements back and forth to the fence. Further, it is respectfully submitted the evidence on appeal is to be reviewed in a light most favorable to the Government. *Enriquez v. U.S.A.* (9th Cir., 1964) 338 F.2nd 165.

On the second day of trial, November 18, 1966, after one continuance of the trial, September 21, 1966, with no previous motion by Lopez-Hernandez's counsel made requesting for revelation of the informant, Lopez-Hernandez waited until trial to request the revelation of the informant. As was stated by Government's counsel:

"Miss Diamos: I don't see where all of a sudden it is relevant today when Mr. Geyler has had the benefit of the Government's report since the night before the original trial date of September 21st. I submit this is only a means to prolong the trial to get another continuance. This man was present, the defendant, he would know him just as well, his availability would be just the same to the defendant and I don't see why this red herring has to be dragged out. I submit the name of the informer is privileged and further it is not necessary to the defendant's defense and this is rather a late time to be



bringing it up because Mr. Geyler has had my file made available to him since September 20th." (RT 50 L 18 to 51 L4).

Lopez-Hernandez's counsel denied having the Government's file which was not asserted, but admitted the report had been given to him to read on September 20, 1966. (RT 51 L5-8)

The Court then sustained the privilege on the timeliness (RT 51 L 15-18). Lopez-Hernandez's counsel then avowed he would not seek a continuance (RT 51 L 20-22).

In *Ruiz v. U.S.A.* (9th Cir., 1967) 380 F.2d 17 this Court stated at page 18:

"The particular circumstances of this case do not compel disclosure of the identity of the informant. There was no adequate showing that his testimony would have been significant or that the defenses would have been changed or strengthened by knowledge of his identity or his production in court. The trial court's rulings were correct."

It is respectfully submitted there was a fair determination of the cause.

## **2. The conviction under the indictment was sustained by the weight of the evidence.**

Lopez-Hernandez's counsel moved for judgment of acquittal at the close of the Government's case (RT 111-113) which was denied (RT 114).

No motion was made at the close of all the evidence (RT 158), when the instructions were settled (RT 159 to 161) or when the jury retired (RT 176). It is respectfully submitted he has waived the sufficiency of the evidence. *Robbins v. U.S.A.* (9th Cir., 1965) 345 F.2d 930.

Further, in discussing the evidence Lopez-Hernandez ignores Washington's testimony found on pages 63 to 64 of the Reporter's Transcript and Turner's testimony at page 32 and Cameron's testimony at page 81, where Washington describes arriving at the International Boundary, walking up to

the fence, Lopez-Hernandez's crossing the fence into Mexico and Lopez-Hernandez going to the man and staying there a few minutes, and the displaying by Lopez-Hernandez of one contraceptive to Washington, the walk back towards the car, the twig snapping, the flash of light, the swing of Lopez-Hernandez's left hand to the right throwing the single contraceptive, Turner then blocking Washington's view, Turner seeing Lopez-Hernandez reach into his right trouser pocket and tossing something, Cameron seeing a package in the light of his flashlight leave Lopez-Hernandez.

Appellant argues that heroin worth \$350 an ounce in the Mexican side (RT 28) was left lying around in the brush by someone else and was not the package Turner and Cameron saw being tossed by Lopez-Hernandez is straining one's credibility too far.

Further, the chemist brought out the single contraceptive was 50 per cent pure while the other five contraceptives were only 30% pure (RT 104). This would be typical to have the sample, the only heroin to be shown to the prospective buyer, less diluted than the entire amount.

It is respectfully submitted the sufficiency of the evidence has been waived, and even if it had not been, the evidence is sufficient.

## **VI. CONCLUSION**

There was no grounds for the revelation of the informant, and, further, the evidence was sufficient.

Respectfully submitted,

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United States Attorney  
for the District of Arizona

*Jo Ann D. Diamos*  
JO ANN D. DIAMOS  
Assistant U. S. Attorney  
Attorney for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

*Jo Ann D. Diamos*  
JO ANN D. DIAMOS  
Assistant United States Attorney

Three copies of the Brief of Appellee mailed this.. *2nd*  
day of ~~October~~, 1967, to:  
*November*

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NO. 21751/

UNITED STATES COURT  
OF APPEALS  
FOR THE NINTH CIRCUIT

---

PAUL MACARTHUR HUNTER,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

---

BRIEF OF APPELLEE

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION

**FILED**

MAY 19 1967

WM. B. LUCK, CLERK

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98104

MAY 20 1967



1 NO. 21751

2  
3 UNITED STATES COURT  
4 OF APPEALS  
5 FOR THE NINTH CIRCUIT  
6

7  
8 PAUL MACARTHUR HUNTER,

Appellant,

9 vs.

10 UNITED STATES OF AMERICA,

11 Appellee.  
12

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14 BRIEF OF APPELLEE  
15

16  
17 APPEAL FROM THE UNITED STATES DISTRICT COURT  
18 FOR THE WESTERN DISTRICT OF WASHINGTON  
19 NORTHERN DIVISION  
20

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1  
2 NO. 21751

3 UNITED STATES COURT  
4 OF APPEALS  
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6 PAUL MACARTHUR HUNTER,

7 Appellant,

8 vs.

9 UNITED STATES OF AMERICA,

10 Appellee.

11  
12 APPEAL FROM THE UNITED STATES DISTRICT COURT  
13 FOR THE WESTERN DISTRICT OF WASHINGTON  
14 NORTHERN DIVISION

15 BRIEF OF APPELLEE

16  
17 STATEMENT OF JURISDICTION

18 Appellant was charged in the following one count  
19 Indictment with refusing to be inducted into the Armed Forces  
20 of the United States on or about January 11, 1966, (R1):

21 "The Grand Jury charges:

22 That on or about January 11, 1966, at Seattle,  
23 Washington, within the Northern Division of the  
24 Western District of Washington, PAUL MACARTHUR  
25 HUNTER did knowingly, wilfully and unlawfully  
fail, neglect, and refuse to perform a duty  
required of him by the Universal Military Training  
and Service Act, and the rules, regulations,  
and directions made pursuant thereto, in





1  
2 that, having been duly and regularly ordered by a  
3 local Selective Service Board to report and  
4 submit to induction into the Armed Forces of the  
United States of America, he failed, neglected  
and refused to be inducted.

5 All in violation of Title 50 U.S.C., App.,  
6 Section 462, and 32 C.F.R. 1632.14."

7 Appellant entered a plea of not guilty on September 2,  
8 1966, waived trial by jury (R3)<sup>1/</sup> and was tried by the Court  
9 on December 6, 1966. The Court took the case under advise-  
10 ment and announced a decision of guilty on December 16, 1966.  
11 Appellant was sentenced on February 3, 1967, to the custody  
12 of the Attorney General for a period of three years (R6). A  
13 timely notice of appeal was filed on February 3, 1967, also.  
14 (R8)

15 Jurisdiction of the District Court was based on Title 18,  
16 United States Code, Section 3231. This Court has jurisdiction  
17 of the appeal under Title 28 U.S.C., Section 1291 and 1294.

18 COUNTERSTATEMENT OF THE CASE

19 The evidence at trial established that the appellant  
20 was ordered by Local Board No. 14, Selective Service System,  
21 Yakima, Washington, on December 29, 1965, to report for

22 1/  
23 In this brief (R) will refer to the number of the  
24 records herein given by the Clerk of the Court for  
25 the Western District of Washington. (TR) will refer to  
the Court Reporter's Transcript of proceedings. (EX)  
will refer to exhibits.





1 induction into the Armed Forces of the United States on  
2 January 10, 1966, at Seattle, Washington (EX 39). Appellant  
3 reported to the induction station in Seattle, but refused  
4 to be inducted into the Armed Forces of the United States.  
5 (EX 1-3) At that time he signed a witness statement as  
6 follows:  
7

8 "I refuse to be inducted into the Armed Forces  
9 of the United States." /s/ Paul Macarthur Hunter."  
(EX 1-3)

10 The following summary of events leading up to  
11 appellant's refusal to be inducted is presented in  
12 chronological order for the court's convenience:

13 July 6, 1961: Registrant indicated to Local Board No.  
14 14, Yakima, Washington, on a classification questionnaire  
15 that he was conscientiously opposed to participation in  
16 war in any form. (EX 103 through 113)

17 July 17, 1961: Registrant submitted a completed  
18 conscientious objector form (SSS Form No. 150) to Local  
19 Board No. 14. (EX 92 through 102)

20 August 8, 1961: Registrant was classified in class  
21 I-A and notified of said classification on August 11, 1961.  
22 (Cover Sheet)

23 August 21, 1961: Registrant requested a personal  
24 appearance hearing with the Appeal Board. (EX 82)  
25



1           November 3, 1961: Registrant was given an appointment to  
2 appear before Local Board No. 14 on November 7, 1961. (EX 80)  
3

4           November 7, 1961: Registrant failed to appear for  
5 personal appearance before Local Board as scheduled. (EX  
6 Cover Sheet and 78)

7           December 20, 1961: The Appeal Board reviewed regis-  
8 trant's file and tentatively determined that he should not be  
9 classified in Class I-O or in a lower class. (Cover Sheet)

10           The Appeal Board on December 29, 1961 sent the regis-  
11 trant's file to the United States Attorney, Spokane,  
12 Washington, for an FBI background investigation and for trans-  
13 mission to a Department of Justice Hearing Officer. (EX 77)

14           May 11, 1962: Registrant appeared before a Department  
15 of Justice Hearing Officer at Spokane, Washington. (EX 71)

16           June 26, 1962: T. Oscar Smith, Chief, Conscientious  
17 Objector Section, Department of Justice, recommended to the  
18 Appeal Board that Hunter's conscientious objector claim be  
19 not sustained. (EX 70-72)

20           July 2, 1962: Registrant was furnished with a copy of  
21 the recommendation of the Department of Justice to the  
22 Appeal Board for the Eastern Judicial District of Washington.  
23 (EX 69)  
24  
25





1  
2 August 1, 1962: Registrant submitted additional infor-  
3 mation to the Appeal Board. (EX 67)

4 August 15, 1962: The Appeal Board for the Eastern  
5 Judicial District of Washington classified registrant I-A.  
6 (Cover Sheet) The registrant was notified of this classifi-  
7 cation on August 29, 1962. (Cover Sheet)

8 February 4, 1964: The registrant was ordered to report  
9 for an Armed Forces physical examination on March 2, 1964  
10 and was found acceptable for induction on March 3, 1964.  
11 (EX 55 through 57)

12 December 8, 1964: Registrant was ordered to report for  
13 induction on January 4, 1965, but was found physically  
14 disqualified due to high blood pressure on January 5, 1965.  
15 (EX 49 through 50)

16 February 2, 1965: Registrant was classified I-Y  
17 (Cover Sheet)

18 October 21, 1965: Registrant was again ordered to re-  
19 port for Armed Forces physical examination on November 16,  
20 1965, and was found fully acceptable for induction on  
21 November 17, 1965. (EX 40 through 41)

22 December 29, 1965: Registrant was ordered to report  
23 for induction on January 10, 1966. (EX 39)

24 January 11, 1966: Registrant reported to the Armed  
25 Forces Examining and Entrance Station, Seattle, Washington,





1 but refused to be inducted. He signed a statement which  
2 reads as follows:  
3

4 "I refuse to be inducted into the Armed Forces  
5 of the United States. Signed Paul Macarthur  
6 Hunter."

(EX 1 through 3)

#### 7 QUESTIONS PRESENTED

8 Was there a basis in fact for the Appeal Board's  
9 denial of the appellant's claim for a conscientious objector  
10 classification?

#### 11 SUMMARY OF ARGUMENTS

12 The appellant's selective service file reveals that,  
13 by his own admission appellant had fallen away from the  
14 Jehovah's Witness Church. The file further indicates that  
15 associates and references of the appellant's stated that  
16 appellant does not live up to the convictions of his faith  
17 and is inactive in said faith. This evidence constitutes  
18 an ample "basis in fact" to sustain the appellant's draft  
19 classification.

#### 20 ARGUMENT

21 The test to be applied in determining whether there is  
22 a basis in fact for the denial of a registrant's claim for  
23 conscientious objector status was stated by the Supreme  
24 Court in Witmer v. United States, 348 U.S. 375 through 382,  
25



1  
2 75 S.Ct. 392, 395 through 396, 99 L.Ed. 428, where the Court  
3 said:

4 "The primary question here is whether, under the  
5 facts of this case, the narrow scope of review  
6 given this Court permits us to overturn the  
7 Selective Service System's refusal to grant  
8 petitioner conscientious objector status. It  
9 is well to remember that it is not for the courts  
10 to sit as super draft boards, substituting their  
11 judgment on the weight of the evidence for those  
12 of the designated agency. Nor should they look  
13 for substantial evidence to support such deter-  
14 mination. Dickinson v. United States (195),  
15 346 U.S. 389, 396, (74 S.Ct. 152, 157, 98 L.Ed.  
16 132). The classification can be overturned only  
17 if it has 'no basis in fact'...."

18 The Court went on to say that a registrant cannot make out  
19 a prima facie case from objective facts alone because the  
20 ultimate question is always the sincerity of the registrant  
21 in objecting to participation in war. The objective facts  
22 are relevant only insofar as they help in determining the  
23 sincerity of the registrant in his claimed belief, which  
24 sincerity is purely a subjective question. The Court then  
25 concluded:

"In conscientious objector cases, therefore, any  
fact which casts doubt on the veracity of the  
registrant is relevant."

In Estep v. United States, 327 U.S. 114, 122-123, 66  
S.Ct. 423, 427, 90 L.Ed. 567, the Court stated:

"Courts are not to weigh the evidence to determine  
whether the classification made by the local board





1 was justified. The decisions of the local boards  
2 made in conformity with the regulations are final  
3 even though they may be erroneous. The question  
4 of jurisdiction of the local board is reached only  
if there is no basis in fact for the classification  
which it gave the registrant."

5 The government submits that the following objective  
6 facts were available to the appeal board when it classified  
7 the appellant I-A and these facts, though objective, are  
8 relevant because they help in determining the sincerity of  
9 the registrant in his claimed belief, which, as stated above,  
0 is purely a subjective question:

1 1. When the registrant first registered with Local  
2 Board No. 14 on July 6, 1961, he stated that his attendance  
3 at Jehovah's Witness meetings had been irregular. (EX 108)  
4 He further stated that he had been a full-time minister for  
5 four months in 1959 and "then I fell away from the church.  
6 That is, I quit going until a few months ago." (EX 108)

7 2. A former employer of the registrant stated in the  
8 resume of inquiry that he believes the registrant was afraid  
9 to go into Military Service because of his insecurity  
0 brought on by the type of family life to which he had been  
1 subjected. (EX 73)

2 3. A congregation's servant of the Southeast Unit of  
3 Jehovah's Witnesses in Yakima advised that the registrant  
4 was a member of the Northeast Unit, but the Northeast Unit  
5





1  
2 stated it had no record of the registrant and had never  
3 heard of him. (EX 76)

4 4. A magazine territory servant of Jehovah's Witnesses  
5 at Yakima advised that he had studied with the registrant  
6 for about one year but that the registrant was irregular in  
7 attendance at meetings. (EX 76)

8 5. A member of the Southeast Unit of Jehovah's Witnesses  
9 in Yakima advised that she had been acquainted with the  
10 registrant for a year or two and believes that registrant's  
11 religious conviction is the real truth, but further states  
12 that the registrant does not live up to it. She further  
13 advised that the registrant had gone out to work only once to  
14 her knowledge and had not been at meetings in nine months;  
15 that he was backward, not outstandingly sincere, but of good  
16 character. (EX 76)

17 6. A reference listed by the registrant advised that  
18 the registrant was active and regular in his attendance at  
19 one time, but that at the present time (February 6, 1962)  
20 the registrant was inactive and no longer attended meetings at  
21 Yakima. This reference believed that the registrant had been  
22 inactive since 1959. He further stated that he believed the  
23 registrant to be sincere, but further believed that the  
24 registrant did not apply his sincerity to his work of a  
25



1  
2 religious nature. (EX 76)

3       7. A representative of Hobeck Precision Metals, Inc.,  
4 Burbank, California, advised that the registrant had worked  
5 there in 1962 as a pressman. The firm engages in subcon-  
6 tractor work for prime contractors in national defense, and  
7 the registrant's duties involved pressing metal parts which  
8 were subsequently used in various machines of national  
9 defense. (EX 74) Although the record is not clear in  
10 defining exactly the type of national defense machines upon  
11 which the registrant worked, the law is very clear that a  
12 registrant's willingness to engage in the production of  
13 defense materials constitutes a basis in fact for denial of  
14 his conscientious objector claim for exemption from military  
15 service. White v. United States, 215 F.2d 782 (Ninth Cir.  
16 1954), cert. den. 348 U.S. 970. This court has followed  
17 the same rule in United States v. Kenneth G. Storey, 370  
18 F.2d 255 (Ninth Cir. 1966). And the same rule has been  
19 adhered to in numerous other circuits. See Blalock v. United  
20 States, 247 F.2d 615 (4th Cir. 1957); Meredith v. United  
21 States 247 F.2d 622 (4th Cir. 1957); Robertson v. United  
22 States, 208 F.2d 166 (10th Cir. 1953); United States v.  
23 Neverline, 266 F.2d 180 (3rd Cir. 1959).  
24  
25





1  
2 8. The Hearing Officer, before whom Hunter appeared  
3 on May 11, 1962, was able to personally observe the  
4 registrant's demeanor and attitude during the hearing, and  
5 reported that Hunter was not familiar with the teachings of  
6 the organization or the training of the Jehovah's Witnesses;  
7 that he referred only in general terms to the Bible and said  
8 he did very little reading. On the basis of his personal  
9 observations of the registrant and of their conversation,  
10 the Hearing Officer concluded that the registrant was seeking  
11 an excuse to avoid military service and that he was not  
12 opposed to such service by reason of his religious training  
13 or his own beliefs. (EX 71)

14 CONCLUSION

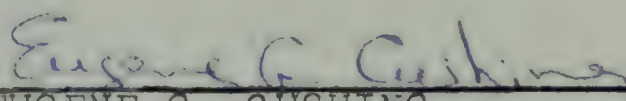
15 The government contends that there are ample facts to  
16 support the Appeal Board's decision that the registrant should  
17 not be classified I-0. This is not a situation where the  
18 decision has been based solely on the personal impression of  
19 one person; rather, it is a situation where the Local Board,  
20 Hearing Officer, Department of Justice, and the Appeal Board  
21 have taken into consideration evidence of events concerning  
22 the registrant over a period of several years. Included for  
23 consideration with the facts that the registrant, by his own  
24 admission had fallen away from his church and the further  
25

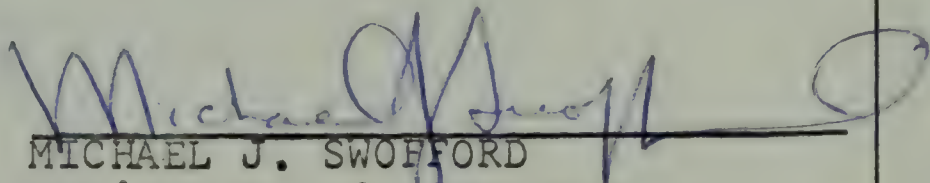




1 information furnished by associates and references of the  
2 registrant who stated that he does not live up to his  
3 convictions and is inactive in the Jehovah's Witness faith.  
4 It is certainly reasonable to assume that the Appeal Board  
5 made its final classification decision on the basis of these  
6 facts. Therefore, the government respectfully contends that  
7 the registrant's defense of conscientious objection should  
8 not be sustained because there is a "basis of fact" for the  
9 classification by the Appeal Board, in accordance with the  
10 standard of judicial review set forth by Estep v. United  
11 States, supra, and Witmer v. United States, 348 U.S. 375,  
12 380-382. Accordingly, the government respectfully urges  
13 that the judgment of the District Court be affirmed.  
14

15 Respectfully submitted,

16  
17   
18 EUGENE G. CUSHING  
United States Attorney

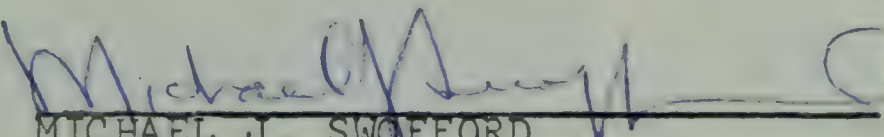
19  
20   
21 MICHAEL J. SWOFFORD  
Assistant U.S. Attorney

22 1012 U.S. Courthouse  
23 Seattle, Washington  
24 98104  
25



1  
2  
3 CERTIFICATION

4 I hereby certify that, in connection with the  
5 preparation of this brief, I have examined Rules 18 and 19  
6 of the United States Court of Appeals for the Ninth Circuit  
7 and that, in my opinion, the foregoing brief is in full com-  
8 pliance with those rules.

9   
10 MICHAEL J. SWOFFORD  
Assistant United States Attorney

11 DATED at Seattle, Washington  
12 this 18 day of May, 1967.  
13  
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No. 21752  
No. 21752A

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IN THE  
**United States Court of Appeals  
for the Ninth Circuit**

---

SUPER MOLD CORPORATION,  
*Appellant,*  
vs.

CLAPP'S EQUIPMENT DIVISION, INC.,  
*Appellee.*

---

CLAPP'S EQUIPMENT DIVISION, INC.,  
*Appellant,*  
vs.

SUPER MOLD CORPORATION,  
*Appellee.*

---

**PLAINTIFF-APPELLANT'S OPENING BRIEF**

---

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LONG BEACH REPORTER

SEP 15 1967

WM. B. LUCK, CLERK





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*Appellee.*

---

CLAPP'S EQUIPMENT DIVISION, INC.,

*Appellant,*

vs.

SUPER MOLD CORPORATION,

*Appellee.*

---

**PLAINTIFF-APPELLANT'S OPENING BRIEF**

---

This is an appeal by plaintiff from a Summary Judgment and Decree granted by the United States District Court for the Central District of California upon motion of the defendant holding all claims of United States Letter Patent No. 3,162,898 to be invalid and void. Defendant-appellee has filed an ap-

peal alleging the District Court erred in concluding that the case was not an exceptional case within the meaning of 35 U.S.C. 285 justifying the award of reasonable attorneys' fees to defendant.

## JURISDICTIONAL STATEMENT

Jurisdiction to review the judgment and decree of the District Court is conferred by 28 U.S.C. 1291. The judgment is a final judgment within the provisions of Rules 54(b) F.R.C.P. and the Rules of this Court. There is no dispute as to the jurisdiction of the subject matter or of the parties.

## STATEMENT OF THE CASE

### A. History Of The Controversy

Plaintiff-appellant filed its Complaint July 7, 1965 alleging infringement of U. S. Patent No. 3,162,898 directed to tire retreading apparatus. Defendant-appellee Clapp's Equipment Division, Inc. filed an Answer and Counterclaim August 16, 1965. Plaintiff-appellant filed its Reply to the Counterclaim September 1, 1965.

On April 19, 1966 defendant filed a Motion For Separate Trial Under Rule 42(b) F.R.C.P. on the issue of whether or not the invention of the patent in suit is invalid under 35 U.S.C. 102 (b) because placed in public use or on sale in this country more than one year prior to the date of application for the patent. Plaintiff consented to Defendant's Motion for Separate Trial and on April 20, 1966 the District Court ordered a separate trial.



Rather than proceeding with a separate trial, on October 3, 1966, defendant filed a Motion For Summary Judgment. This motion sought a summary judgment that the patent in suit be held invalid under 35 U.S.C. 102(b) because the invention described and claimed in said patent was allegedly in public use and on sale in this country more than one year before the application for said patent was filed. The Motion For Summary Judgment also urged the award of attorneys' fees under 35 U.S.C. 285. Plaintiff filed appropriate papers opposing the Motion For Summary Judgment and the District Court conducted a hearing on the Motion For Summary Judgment December 12, 1966.

On January 10, 1967, the District Court filed Findings of Fact, Conclusions of Law and a Summary Judgment holding all claims of Patent No. 3,162,898 in suit to be invalid and void because the invention had been on sale more than one year prior to the patent filing date, dismissing plaintiff-appellant's Complaint, but holding that the award of reasonable attorney's fees to defendant would not be justified. Plaintiff filed its Notice of Appeal to this Court February 6, 1967 and defendant filed its Notice of Appeal February 7, 1967.

On July 3, 1967, the District Court filed an ORDER CORRECTING AND AMENDING JUDGMENT ON CLAIM FOR PATENT INFRINGEMENT NUNC PRO TUNC, such order specifically reciting that there was no just reason for delay in the entry of the Final Judgment and that the original Judgment

dismissing plaintiff's Complaint constitute a Final Judgment as to the claim of patent infringement.

## **B. Background Of The Invention**

It is absolutely essential to a complete understanding of the issues in this case that this Court be apprised of the background of the invention. In considering such background, this Court should keep in mind that the patent in suit was filed October 29, 1959. Hence, the critical date under 35 U.S.C. 102(b) was October 29, 1958.

In early 1958 the tire retreading industry faced a problem of crooked treads on casings of lighter construction. This problem affected the tire retreading molds sold by Trutred Tire Molds, Inc., as well as the molds made by competitors of Trutred. (Fike Depo. 17). Trutred was purchased by plaintiff in 1960. The crooked tread problem was compounded by the variety of tire tread designs, the different ply thicknesses, carcass strength and other miscellaneous factors (Fike Depo. 13). Sears, Roebuck & Co., a Trutred customer, was using approximately 250 tire molds and requested Louis T. Fike, the inventor of the patent in suit and General Manager and Vice President of Trutred, to attempt to solve this industry-wide problem (Record 263). Sears had previously in February 1958 requested the defendant in this action to solve such problem (Record 169), but so far as the record is concerned, defendant was unable to provide a satisfactory solution.

Upon being apprised of the problem, the inventor Fike conceived a so-called "Bead or Tread Aligner"



(sometimes referred to as "Centering Rings") which he believed could be added as an accessory to the existing tire retreading molds and function so as to eliminate the problem of crooked tire treads. Upon informing Sears of his proposed solution, Sears requested Fike to design two prototype Bead Aligners and install them on two tire molds owned by Sears (Record 263). These two prototypes were completed and operated at the Sears Retreading Plant in Los Angeles, California in April and May of 1958 (Record 271). Although such prototypes were not commercially usable devices, the preliminary testing thereof indicated to Fike that the broad inventive principles were probably correct and in June 1958 he informed Sears of this fact.

Sears then stated it would order from Trutred approximately 248 Bead Aligners, one for each existing tire mold (Record 206). Note that this order was "on approval" — Answer to Interrogatory 1. (i) (Record 117).

### **C. The Necessity Of The Experimental Program**

At this point in time the inventor Fike believed his inventive concept was sound even though the two prototypes were not commercially useable because of frequent breakdowns (Record 274). In this regard, it should be noted that if a Bead Aligner breaks down, the tire retreading mold to which it is attached must be taken out of service pending repair of the Bead Aligner. Thus, an important capital investment is tied up by the malfunction of but one of its parts (Fike Depo. 29).



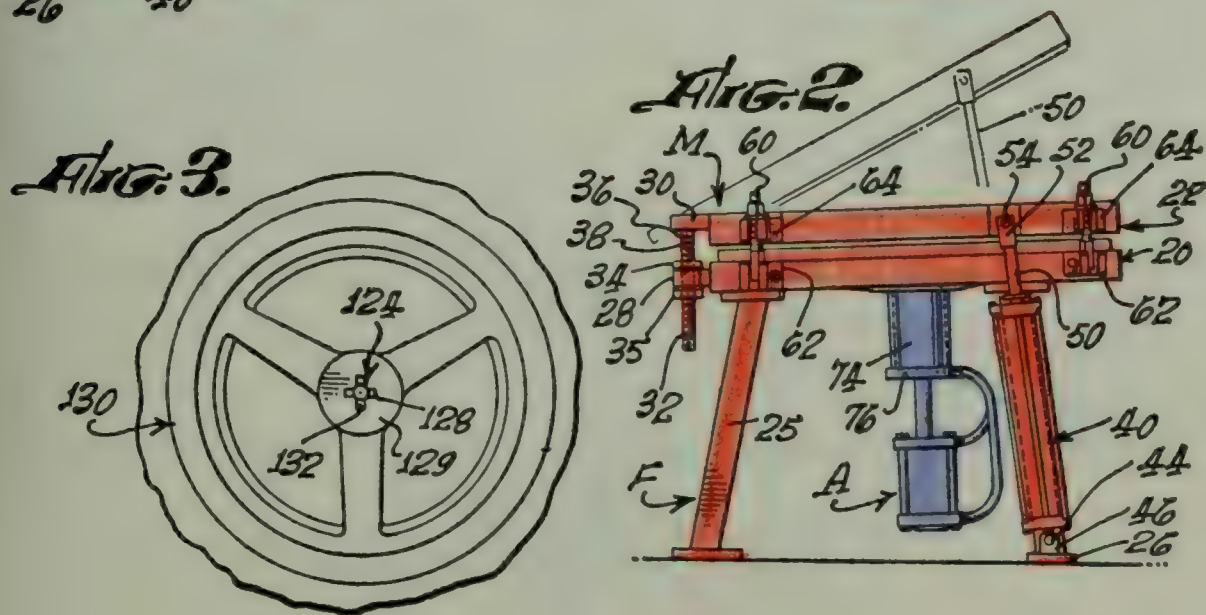
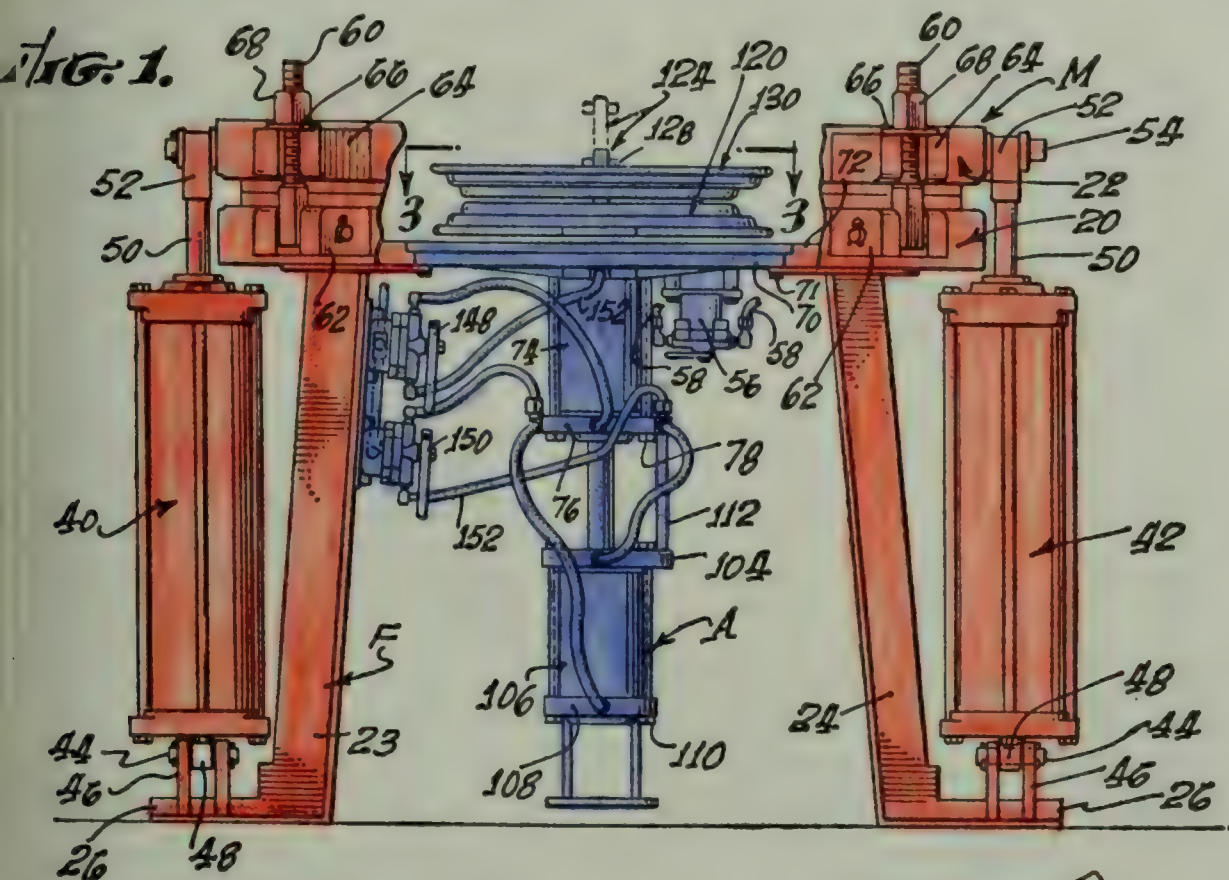
Under these circumstances, Fike realized it would be necessary to conduct further development and testing before his Bead Aligner could become a commercially useable product, and further that if he had attempted to complete such research and development program using only the original one or two prototypes, it would literally have taken years to complete such program (Record Page 271). This was true because of the aforementioned fact that the tire retreading molds were used with tires of varying tread designs, ply thickness and carcass strength (Fike Depo. 12), as well as by different types of personnel (Record 274). Additionally, The Fike Bead Aligner had to be fitted not only to the Trutred tire mold but also to competitors' tire molds being operated by Sears (Record 213). Moreover, since Trutred was a small company the expenditures necessary for a vigorous experimental program would be too heavy (Fike Depo. 15). Trutred was not in the tire retreading business and did not have facilities for full scale testing of the Bead Aligners (Record 271).

Under these circumstances, to expedite such experimental program, Fike on August 5, 1958 formally acknowledged the Sears' order for approximately 248 Bead Aligners, such Bead Aligners to be installed upon existing Sears' tire retreading molds (Record 271) and Finding of Fact 5, (Record 326).

#### **D. The Invention**

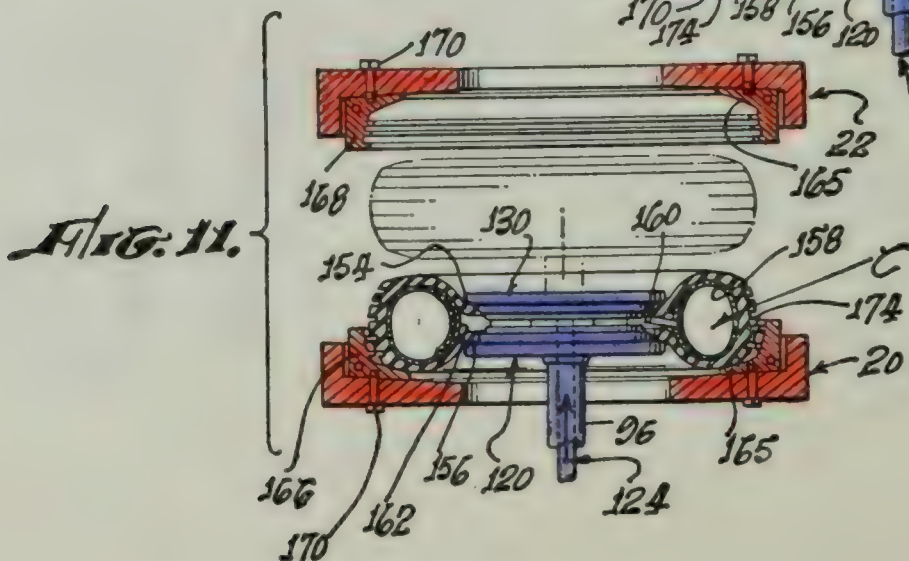
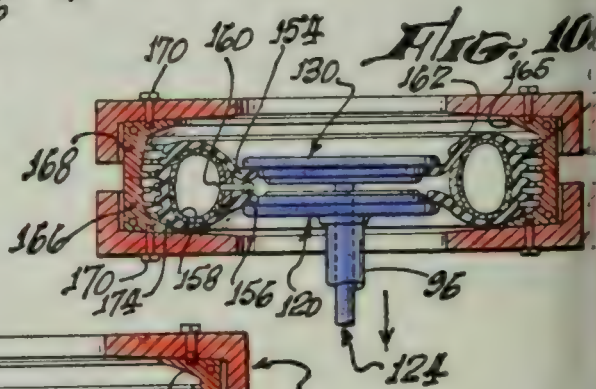
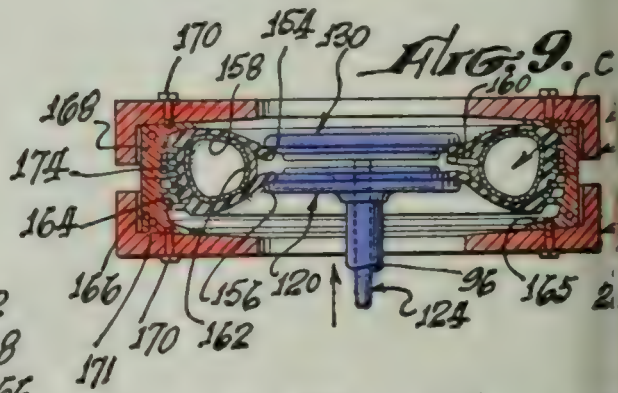
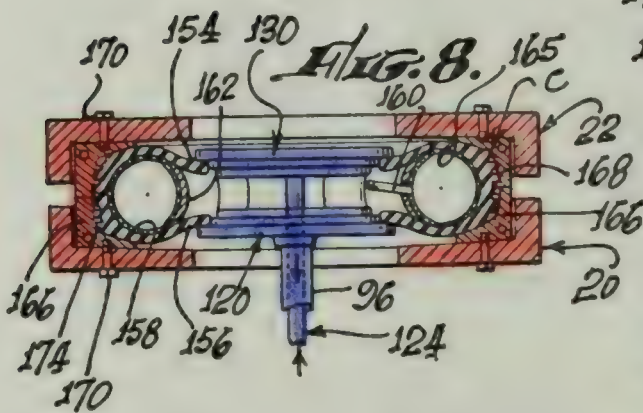
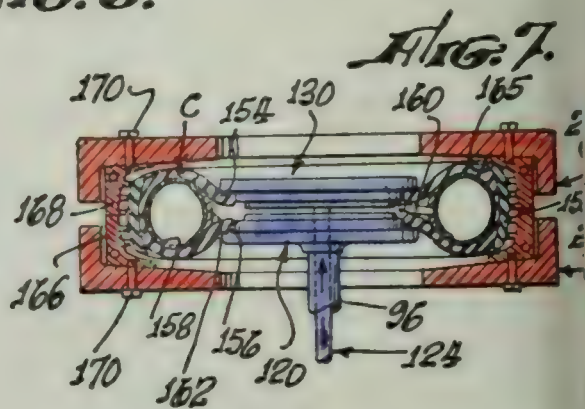
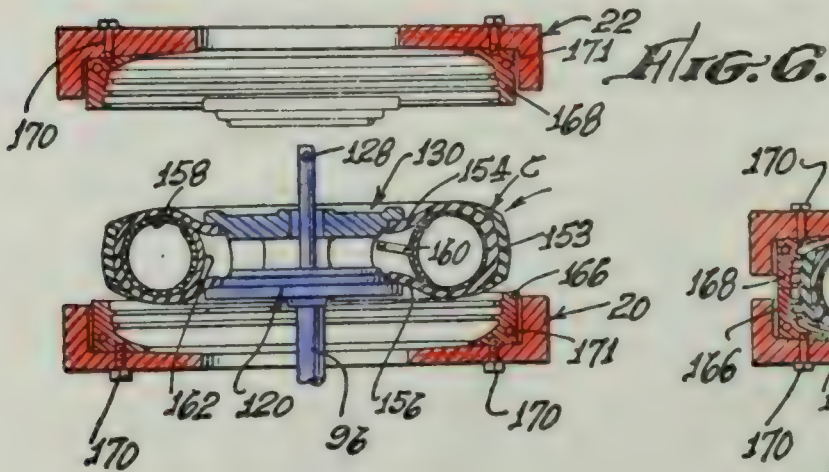
The necessity of conducting the experimental program will be made apparent when the details of the invention are considered.

A copy of Patent No. 3,162,898 in suit appears in the Appendix hereto. For the convenience of the Court, however, there appears immediately herebelow copies of Fig. 1 and Fig. 2 of this patent. Referring to these drawings, a conventional tire retreading mold is shown colored red while the patented Fike Bead Aligner has been colored blue. It should be understood that the blue Bead Aligner is rigidly secured to the red tire retreading mold.





The operation of the patented Bead Aligner in conjunction with the tire retreading mold is shown in Fig. 6 through Fig. 11 of the drawings of the patent in suit. To facilitate this Court's understanding of such operation, these figures appear immediately herebelow. Again the tire mold parts are colored red while the Bead Aligner parts are colored blue.





Referring to the above drawings, it will be seen that in Fig. 6 upper half of the tire mold has been opened so as to receive the tire carcass C which is to be retreaded, such carcass having been provided with an unvulcanized band of rubber 153. The beads of the tire carcass C are engaged by upper bead wheel 130 and lower bead wheel 120 of the Bead Aligner mechanism.

Referring now to Fig. 7 the upper wheel 130 and lower wheel 120 are urged together by means of the power cylinders of the bead aligner to thereby squeeze the beads of the tire carcass C together and thereby reduce the outer diameter of the tire carcass whereby the bead wheels can be moved downwardly urging the carcass into the confines of the tire retreading mold.

Referring now to Fig. 8, the bead wheels 120 and 130 are separated thereby relaxing the beads of the tire carcass whereby it can flex into its normal expanded position tightly against the mold upper and lower halves of the tire retreading mold and exactly centered both horizontally and axially relative to the latter. The mold halves are then heated so as to vulcanize the previously unvulcanized tire retreading material 153 to the tire carcass C.

Referring now to Fig 9 and Fig. 10, at the conclusion of the vulcanizing operation it is necessary to loosen the treads of the completed tire from the upper and lower halves of the tire retreading mold. This is effected by moving the bead wheels 120 and 130 together and thereafter rocking the tire beads first

upwardly, then downwardly as shown in these two figures.

Finally, with the upper and lower bead wheels 130 and 120 urged together so as to again reduce the outer diameter of the vulcanized tire casing C, the tire is moved upwardly out of the confines of the lower mold half 20, the upper mold half 22 already having been moved to its open upper position.

Although the operational steps affected by the patented Bead Aligner may appear simple, the structural elements of the Bead Aligner and their cooperative relationship with the tire retreading mold are in fact quite complex. Thus, as shown in the patent drawings, the upper and lower bead wheels 130 and 120, respectively, are operated by means of a hollow tube 96 through which extends a long vertical shaft 124. The shaft and tube must be selectively moved both concurrently and separately to maintain the bead wheels in exact concentricity with the tire mold halves 20 and 22. This movement is effected by air cylinders 74 and 106 through valves 148 and 150 and interconnecting tubing as shown particularly in Fig. 1 of the patent drawings. A reading of the patent will also make it clear that such operation is complicated by the extreme high temperatures at which this equipment must operate. Moreover, the operators of tire retreading equipment are traditionally rough-handed (Fike Depo. 46).



## E. The Experimental Program

In accordance with the Bead Aligner order, Sears from August 1958 until November 6, 1958 was periodically sent a series of invoices by Trutred. Sears paid Trutred on such invoices shortly after receipt since it was only possible for Trutred to go forward with the construction, installation and reworking of the Bead Aligners by having Sears pay for the Bead Aligners as they were manufactured (Record 272).

Commencing in August 1958 and continuing into November 1958, Trutred personnel under the personal supervision of the inventor Fike constructed and installed Bead Aligners embodying the patented invention on Sears tire molds. Such Bead Aligners were hand-built and were not constructed on a production basis (Record 271) (Fike Depo. 31).

These Bead Aligners were constructed in the Trutred shop one at a time rather than being constructed by the assembly line method and no jigs and fixtures were utilized as in the case of other Trutred products (Fike Depo. 32).

As the Bead Aligners were constructed they were promptly installed on the tire treading molds owned by Sears under the supervision of Fike. Fike had free access to the Sears retreading shops in which the Bead Aligners were installed and Sears employees reported to Fike each instance of a breakdown of Bead Aligner (Record 271). Upon receiving a report of a breakdown, Fike tried to determine whether the failure was due to abuse on the part of the mold operators or



due to a fault in his design (Fike Depo. 46). Where the breakdown resulted from a fault in design, Fike would remove the defective part from the broken-down Bead Aligner and redesign said part so as to overcome the design fault.

The redesigned part was then replaced in the Bead Aligner from which it had been removed and if such part then proved satisfactory identical replacement parts were made for each and every one of the approximately 248 Bead Aligners. Such replacement parts were then installed in these other Bead Aligners. Fike continued his watchdog activities with the Sears devices until approximately January 1959 at which time the breakdowns had substantially stopped and he believed his Bead Aligner design to be completed and proved (Record 272).

In connection with the experimental program it is important to note that as late as November 5, 1958 Fike sent a detailed report to Sears regarding three causes of breakdowns in the Bead Aligners and pointing out how such defects could be corrected (Record 214). Because of the critical nature of this report as demonstrating the existence of an actual experimental program, a copy thereof appears in the Appendix at page 1a.

#### F. Other Activities of Trutred Prior To The Critical Date

As set forth in Finding of Fact 10, Trutred advertised the Bead Aligner in the September, October and November 1958 issues of Tire, Battery & Accessory

News. The October 1958 advertisement included a photograph of the apparatus, described its advantages and offered a one year guarantee against defective material and workmanship. No proof was offered by defendant as to the actual date of publication of these advertisements.

As recited in Findings of Fact 11 (Record 327), Trutred displayed two of the Bead Aligners at its exhibit booth during a trade show October 11-15, 1958. These devices, however, could not be used in an actual tire retreading operation and instead were chrome-plated display units. The general mode of operation of the Bead Aligners, of course, without actual recapping of tires, was demonstrated at this convention and prices were quoted. The total operation of the Bead Aligners could not be demonstrated by these display units (Fike Depo. 56). No sales orders were taken of the Bead Aligners at this trade show and the door prize was not delivered, since at that time the Sears test program had not been completed and Trutred was not in production on the Bead Aligners for the general trade (Record 272) (Fike Depo. 57).

## G. The Decision Of The Lower Court

Plaintiff filed papers opposing defendant's Motion For Summary Judgment including an Affidavit of the inventor Fike setting forth the background and details of the Sears' sale and testing program as outlined hereinbefore (Record 270). This Affidavit also stated the program could only be conducted if Sears paid for the Bead Aligners as constructed. The Affidavit concluded with the statement (Record 272):



“The sale and use of my tread aligners to Sears was a good faith use for experimental purposes and not a public use.”

Defendant did not file affidavits countering the Fike Affidavit and for the purpose of the Motion For Summary Judgment the District Court had to assume the facts of the Fike Affidavit to be true.

At the comparatively short hearing on Defendant's Motion For New Trial The Lower Court repeatedly referred to the magnitude of the number of Bead Aligners involved in the Sears' program as precluding any experimental use. Thus, note the following from the Reporter's Transcript Of Proceedings in December 12, 1966:

“THE COURT: Wait just a second.

Are you telling me that a sale of 248 units at one hundred — what was it — and sixty dollars a piece, amount to, as I figure it, over \$40,000, could be considered an experimental use?

MR. UTECHT: Certainly.

THE COURT: Have you any authority that goes anywhere near that?

MR. UTECHT: Yes. I cited one in my brief, a 10th Circuit Court of Appeals case decided last December, on page 5.” (Page 4)

\* \* \* \*

“THE COURT: That's a general phrase that the courts have used to state a general doctrine.

What were the facts of Universal as contrasted with the very sizable commercial sale of 200-odd units in this case.” (Page 5)

\* \* \* \*



“THE COURT: If you are saying that the inventor was under some economic pressure to accept this order from Sears or lose them as a customer, I can follow you.

But that is far different from saying that a sale of 248 machines is for experimental use.”  
(Pages 5 and 6)

“THE COURT: Well, Mr. Utecht, I can understand that pushing this exception to the extreme an inventor could conceivably sell one machine and put it in someone else’s location since they had the business under which it could be tested. But under those circumstances, if it were truly experimental, he would be there every day watching it and encountering the problems.

This is seven major cities and 248 machines, and I have a lot of trouble with the concept that such a sale of such magnitude can be for experimentation. Even as a matter of law, it seems to me, it is clearly not for experimentation, and that no evidence of intent could change that result.” (Pages 6 and 7)

After the hearing on the Motion For Summary Judgment the District Court Judge on December 15, 1966 directed a letter to counsel for both parties (Record 343). This letter is extremely important since it provides the actual rationale upon which the lower court rendered its decision that the patented invention was on sale over one year prior to the patent filing date. The letter sets forth the lower court’s reasoning as follows:

“I have decided to grant defendant’s motion for summary judgment submitted December 12,

1966. I will find that there are no contested issues of material fact. I will further find that uncontested facts establish 'public use or on sale' within the meaning of Title 35 U.S.C. § 102(b).

It seems to me that the admitted sale of 248 machines prior to the critical date, precludes any defense based on experimentation and when such large-scale commercial activity has occurred, the alleged intention of the inventor that all of such machines would be used for experimentation, is irrelevant." (Emphasis added)

Findings of Fact, Conclusions of Law and a Judgment were prepared by defendant embodying the rationale of the aforementioned letter from the District Court. The important Conclusion of Law upon which the Judgment of non-validity was based is as follows:

"B. The activities of Trutred prior to the critical date of October 29, 1958 with respect to uses and sales of the apparatus ultimately patented in U. S. Patent No. 3,162,898 placed the alleged invention in public use and on sale in this country more than one year prior to the date of application in the United States within the meaning of 35 U.S.C. Sec. 102(b). To sustain the validity of the patent in light of these activities would result in a circumvention of both the terms and policy of that statutory provision. *Cataphote Corp. v. DeSoto Chemical Coatings, Inc.* (9th Cir. 1966) 356 F.2d 24."

## SPECIFICATION OF ERRORS

1. Conclusions of Law B and C are in error in holding the patent in suit invalid because of a public use or sale in this country more than one year prior to



the date of application of the patent within the meaning of 35 U.S.C. 102(b).

2. The District Court was in error in basing its ruling of invalidity on the sale of the 248 Bead Aligners prior to the critical date, completely disregarding the intention of the inventor that such devices were undergoing experimentation, merely because such sale according to the Court involved "large-scale commercial activity" (The District Court's Letter of December 15, 1966 to counsel, Record 343).

## SUMMARY OF ARGUMENT

35 U.S.C. 102(b) requires that an inventor file a patent before his invention has been in use or on sale for over one year or the patent may be held invalid.

35 U.S.C. 112 requires that an inventor show his best form of the invention in the patent application or the patent may be held invalid.

The doctrine of "experimental use" permits an inventor to test and develop the best form of his invention without invalidating his patent as being "in use" or "on sale" under 35 U.S.C. 102(b).

In this case, the best form of the invention could only be developed by making the sale to Sears and the Sears' program incorporated all of the classical elements of "experimental use."

The number of machines involved in an "experimental use" is immaterial as long as the testing is carried out in good faith. The District Court in this case, however, erroneously held to the contrary.



The District Court erred in substituting for the true fact of the inventor's motivation in conducting the Sears' experimental program the Court's feeling as to what it assumed was his motivation.

In any event, the motivation of the inventor in conducting the Sears' program presented an unresolved question of fact precluding the District Court from properly rendering a Motion For Summary Judgment.

## ARGUMENT

### I. The Rationale of 35 U.S.C. 102(b)

35 U.S.C. 102(b) states:

“A person shall be entitled to a patent unless the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.”

The rationale for the requirement that the inventor file his patent application within one year after the first public use or sale was set forth in the early case of *Pennock v. Dialogue*, 27 U.S. 1, 19 wherein Mr. Justice Story stated:

“If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should, for a long period of years, retain the monopoly, and make and sell his invention publicly, and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure; and then only, when the danger of competition should force him to

secure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what should be derived under it, during his 14 years; it would materially retard the progress of science and the useful arts, and give a premium to those who would be least prompt to communicate their discoveries.”

Specifically, with regard to 35 U.S.C. 102(b), this Court in the recent *Cataphote* case stated (356 F.2d Page 25):

“The express purpose of this statutory provision was to prevent the extension of the monopoly permitted by the patent laws by requiring an inventor to make timely application so that the patent period might commence to run without undue delay.”

Under the provisions of 35 U.S.C. 102(b) an inventor must file his patent application within one year after he first places his invention on sale. If he files after this time his patent can be held invalid. *It should be noted, however, that an inventor must also comply with 35 U.S.C. 112 or his patent can be held invalid.*

## 2. The Rationale of 35 U.S.C. 112

35 U.S.C. 112 cautions an inventor that:

“The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and *shall set forth the best mode contemplated by the inventor of carrying out his invention.*” (Emphasis added)



The rationale behind 35 U.S.C. 112 was concisely set forth in the case of *In re Nelson & Shabica* (CCA June 1960) 282 F. 2d 172 wherein the Court stated:

“The basic purpose of the requirement that the specification contain a written description of the invention is to put those skilled in the art in possession of sufficient knowledge to enable them to practice the invention. One cannot read the wording of Section 112 without appreciating that strong language has been used for the purpose of compelling complete disclosure. There always exists, on the part of some people, a selfish desire to obtain patent protection without making a full disclosure, which the law, in the public interest, must guard against. Hence Section 112 calls for description in ‘full, clear, concise, and exact terms’ and the ‘best mode’ requirement does not permit an inventor to disclose only what he knows to be a second best embodiment, retaining, the best for himself.”

The courts have often applied the sanctions of 35 U.S.C. 112. By way of example, this Court in *Moist Cold v. Johnson* (October 1957) 249 F. 2d 246 held a specification to be fatally deficient stating:

“If there was no disclosure of the means by which the invention was accomplished in the patent claims as aided by the specifications, there could be no valid invention. The trial judge ruled that 35 USCA 112 had not been met because of a failure to disclose the essential thin coil or other extended surface coil in the specification.”

See also *Van Brode v. Cox* (CA 9 1960) 279 F.2d 313 wherein this court held a patent invalid for insufficient disclosure.



In the recent case of *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.* (September 1965) 351 F.2d 546 the Seventh Circuit Court of Appeals held a patent invalid as failing to comply with 35 U.S.C. 112 stating:

“The constitutional provision and implementing patent law are intended to reward with a 17 year monopoly an inventor who ‘refrains from keeping his invention a trade secret.’ *Universal Oil Products Co. v. Globe*, 322 US 471, 484, (1944). The quid pro quo for the monopoly is disclosure which will enable those skilled in the art to practice the invention at the termination of the monopoly, and to warn the industry concerned of the precise scope of the monopoly asserted. To accept the monopoly and withhold the full disclosure of the ‘*best mode contemplated by the inventor*,’ which will result in a contribution to the common good upon the expiration of the monopoly is the ‘selfish desire’ against which 35 U.S.C. 112 is directed. *Application of Nelson*, 280 F.2d 172, 184, 126 USPQ 242, (CCPA 1960).” (Emphasis added)

### 3. The Inventor In This Case Was Placed Between The Scylla Of 35 U.S.C. 102(b) And The Charybidis Of 35 U.S.C. 112.

As set forth hereinbefore, in the summer of 1958 the inventor Fike had tested two Bead Aligners prototypes and believed his basic inventive concept to be correct. Because of the complex mechanical functions of his Bead Aligners, the severe working conditions to which they were exposed and the variety of tires and tire molds involved, Fike could not make a final

determination as to whether or not his combination solved the problem without undertaking a “crash” program under varying working conditions. The Sears’ offer to immediately purchase some 248 Bead Aligners was then made.

At this point of time Fike could have filed a patent application disclosing the construction of his Bead Aligner employed in the two prototypes. By such filing he would have complied with 35 U.S.C. 102(b). Assuming, however, that the construction of his two prototypes later turned out to be not the “best mode” of his invention, he would either be put to the time and expense of filing a second patent application disclosing such “best mode” or risk having his patent held invalid for failure to comply with 35 U.S.C. 112. It should be remembered that Fike’s company Trutred was a small business and could not afford the luxury of several patent filings on a single product.

Under these circumstances Fike elected to withhold the immediate filing of a patent and instead in August 1958 accepted the Sears’ offer.

By hindsight it would now appear Fike’s better choice would have been immediately file a patent application. But suppose as a result of the experimental program Fike’s original design proved unsatisfactory and he had to develop a different ultimate construction for the Bead Aligner than that of his two prototypes. Under these circumstances it is quite possible the defendant herein would be urging invalidity of the resulting Bead Aligner patent as failing to comply with 35 U.S.C. 112.



#### 4. The Doctrine Of "Experimental Use" Safeguards The Rights Of Inventors Such As Fike While Protecting The Public Against Unwarranted Monopolies.

It is well established that where an inventor is in good faith experimenting so as to perfect or test his invention, his failure to file within one year after a public use or sale of the invention is not fatal. A recent case directly in point is *Universal Marion Corp. v. Warner & Swasey* (CA 10 December 30, 1965) 354 F.2d 541 wherein the Court held:

“It is contended that the use of the early Ferwerda machines constitutes a public use within the meaning of the statute. It is well-settled that all uses do not necessarily constitute a public use. Use by an inventor in good faith for the purpose of testing his apparatus or device for experimental purposes is not public use within the scope of the statute, even though incidental to such use he derives some financial return. *Merrill v. Builders Ornamental Iron Co.*, 197 F.2d 16; *McCullough Tool Co. v. Well Surveys, Inc.*, 343 F.2d 381.”

Another case in point is *Merrill v. Builders Ornamental Iron Co.*, (CA 10 1952) 197 F.2d 16 wherein the Court held:

“Whether use of an invention is public or private does not necessarily depend upon the number of persons to whom its use is known. The determinative factor is whether the use is made in good faith for purpose of experiment in testing the qualities and operation of the device or ap-



paratus. (Citing: *Elizabeth v. Pavement Co.*, 97 US 126; *Egbert v. Iippman*, 104 US 333; *Smith & Griffs Mfg. Co. v. Sprague*, 123 US 242 and *Electric Storage Battery Co. v. Shimadzu*, 307 US 5). And use by the inventor in good faith for the purpose of testing his apparatus or device for experimental purposes is not public use within the scope of the statute, even though incidental to use he derives some financial return. Good faith use of an invention for such purpose is not changed in character merely by the receipt of incidental profit or gain."

The cases upholding experimental use nearly all refer to the early *Elizabeth v. Pavement Co.* case cited at 97 US 126. In the *Elizabeth* case the subject matter of the patent was a pavement construction. A length of pavement embodying the invention was publicly used for six years before a patent application was filed. The inventor claimed that such protracted public use was necessary in order to properly test the pavement under actual traffic conditions, such traffic conditions, in fact, being most severe. The Supreme Court sustained the patent on the basis of the "experimental use" doctrine stating:

"Such use is not a public use, within the meaning of the statute, so long as the inventor is engaged, in good faith, in testing its operation. He may see cause to alter it and improve it or not. His experiments will reveal the fact whether any and what alterations may be necessary. If durability is one of the qualities to be attained, a long period, perhaps years may be necessary to enable the inventor to discover whether his purpose is accomplished. And though, during all that period,

he may not find that any changes are necessary, yet he may be justly said to be using his machine only by way of experiment; and no one would say that such a use, pursued with a bona fide intent of testing the qualities of the machine, would be a public use, within the meaning of the statute. So long as he does not voluntarily allow others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent.

It would not be necessary, in such a case, that the machine should be put up and used, only in the inventor's own shop or premises. He may have it put up and used in the premises of another, and the use may inure to the benefit of the owner of the establishment. Still, if used under the surveillance of the inventor, and for the purpose of enabling him to test the machine and ascertain whether it will answer the purpose intended, and make alterations and improvements as experience demonstrates to be necessary, it will still be a mere experimental use and not a public use, within the meaning of the statute."

#### 5. The Sears Program Falls Squarely Within The "Experimental Use" Doctrine.

From the facts set forth hereinbefore, it will be apparent that the facts in this case clearly establish an experimental use. The Bead Aligners were not on general sale and only a sufficient number to comply with the Sears order were constructed. These devices were not constructed on a production basis but



were hand-built without the use of jigs and fixtures, as in the case of the other Trutred products. The completed Bead Aligners were installed on the Sears tire molds under the personal supervision of the inventor Fike. When the Bead Aligners broke down (as was expected by the inventor), he immediately determined the reason for such breakdown and redesigned and replaced defective parts in the particular Bead Aligner. When he determined his solution for preventing the breakdown was successful, he provided all of the other Bead Aligners with the redesigned parts. That the experimental program was in effect on the critical date of October 28, 1958 was clearly established by the written report of Fike to Sears on November 5, 1958.

Because of the summary disposition of this case, there is nothing in the record to indicate whether or not Trutred made any profit from the Sears program. Even assuming a profit was made, however, it would only have been incidental to the experimental use. Thus, the experimental nature of the Sears program would not be changed in character according to the doctrines of the cases cited hereinabove.

It should also be noted that the Sears program did not result in a long delay with respect to the critical date for filing the patent application. Instead, the time between the first delivery of a Bead Aligner to Sears and the critical date was less than three months. Thus, it cannot be said that the patent period commenced to run with "undue delay" as condemned by this Court in the *Cataphote* case (*Supra*).



6. The Lower Court Failed To Appreciate That Whether One Machine Or 248 Machines Were Involved In The Experimental Program Was Immaterial So Long As The Use Of Such Machines Involved A Good Faith Experimental Use.

As pointed out hereinbefore, the District Court placed great emphasis on the fact that the Sears program involved some 248 machines. It is clear from the remarks of the Court at the hearing on Defendant's Motion for Summary Judgment and Paragraph 2 of the Court's Letter to Counsel (Record 343) that the District Court felt the fact that many Bead Aligners were involved in the program rather than one or two devices meant the difference between experimental use and public use. The District Court gave no reason for its conclusion and the logic thereof is difficult to understand.

In the present case the inventor attempted to complete the testing of his invention just as soon as possible. The only way in which this could be accomplished was by installing such invention on many different tire molds exposed to different working conditions, tire types and personnel. Although some 248 units were involved, the design of each was identical and there was in fact but a single sale to a single customer. There was not an unrestricted sale to the general public. Although many units were involved, the changes were made to each and every one of such units. As was set forth in *Merrill v. Builders Ornamental Iron Co.* (Supra), the determinative factor establishing the existence or non-existence of an experimental use

“is whether the use is made in good faith for purpose of experiment in testing the qualities and operation of the device or apparatus.”

The determinative factor should be the same whether one machine of a single design or several machines of the same design are undergoing testing. Either the inventor is conducting an experimental program or he is conducting a sales program. To arbitrarily limit the number of machines which can be used in an experimental program would not be logical, and as noted hereinbefore could readily extend the time necessary to complete the experimental program.

**7. In The Present Case The Only Evidence Before The District Court Clearly Established An Experimental Use And It Was Error For The Court To Ignore Such Evidence.**

As noted hereinbefore, pursuant to the rules concerning summary judgments, plaintiff in opposition to defendant's motion submitted an affidavit of the inventor Fike. This affidavit set forth the necessity for conducting the experimental program as well as the details of the conduct of such program. This affidavit also stated that Trutred did not have sufficient capital to conduct the experimental program and it was only possible to go forward with such program by having Sears pay for the Bead Aligners as they were constructed. Finally, the Fike affidavit stated that:

“The sale and use of my tread aligners to Sears was a good faith use for experimental purposes and not a public use.”



Thus, the intent of the inventor Fike to conduct an experimental program was clearly established. The Court, however, held the inventor's intent to be irrelevant on the sole basis that the program involved 248 machines (Letter to Counsel, Record 343).

This Court in the *Cataphote* case, cited by the District Court in this case as authority for its holding, clearly enunciated the guidelines for deciding whether a public use or an experimental use has taken place as follows:

“The resolution of the sole issue raised regarding Section 102(b) depends entirely on a determination, from the totality of evidence presented by both parties, of *the nature of the acts* committed prior to the critical date and *the purpose that motivated* the commission of those acts.” (Emphasis added)

Applying the above law to the present case, there could be no conflict with respect to the “nature of the acts” since such conflict would raise a material issue of fact thereby precluding the granting of a motion for summary judgment. With regard to “the purpose that motivated” the commission of those acts, plaintiff provided the affidavit of the inventor Fike clearly establishing the fact that his motivation for conducting the Sears program was experimental testing and not a public use. The District Court, however, ignored the inventor's motivation as set forth in his affidavit and substituted therefor the District Court's feeling as to what it assumed was the inventor's motivation. On the basis of such substituted fact the District Court held the Sears program to constitute a sale.



Such action on the part of the District Court was clearly erroneous.

**8. Summary Judgment Was Not Proper In Any Event Since The Fact Of The Inventor's Motivation Was Contested.**

It is well established in this Circuit that a Motion for Summary Judgment should not be granted where there exists even a single genuine issue of fact and that all doubts must be resolved against the moving party. This doctrine has been followed in many Ninth Circuit of Appeals decisions including *Sequoia Union High School District v. United States*, 245 F.2d 227, *Neff Instrument Corp. v. Cohu Electronics*, 269 F.2d 668 and *Grffith v. Utah Power*, 226 F.2d 66.

The following language of this Court from *Cee-Bee Chemical v. Delco*, 263 F.2d 150 in reversing a motion for summary judgment in a patent action is particularly in point:

“If the conclusions reached by the trial court required it to first resolve a genuine issue as to a material fact, the case should not have been disposed of on a motion for summary judgment.”

As noted hereinbefore, the fact as to whether the inventor's motivation in conducting the Sears program was experimental testing or the conduct of a sales campaign was the key as to whether the patent in suit should be held valid or invalid under 35 U.S.C. 102(b). Plaintiff submitted an affidavit establishing the fact that the inventor's motivation was experimental testing and not a public use. Accordingly, there

existed an unresolved question of fact which precluded the District Court from properly granting the Motion For Summary Judgment.

### CONCLUSION

The District Court erred in granting defendant's Motion For Summary Judgment holding the patent in suit invalid.

The District Court's holding should be reversed and the matter remanded to the District Court for trial.

Respectfully submitted,

FULWIDER, PATTON, RIEBER,  
LEE & UTECHT

By Francis A. Utecht  
*Attorneys for Plaintiff-Appellant  
Super Mold Corporation*

### CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

.....  
*Francis A. Utecht*

## APPENDIX A

November 5, 1958

H. A. Barron

Sears Roebuck & Company  
Chicago 7, Illinois

### SUBJECT: *5/8 CENTER SHAFT IN TRUMATIC ALIGNER*

Some of these shafts have had occasion to blow out of aligner. After careful analysis we have found that the 1/2" sel loc nut which holds the piston cup on said shaft in lower cylinder have unscrewed due to short thread. We believe that you will have very few in number to do this. (To repair — remove bottom cylinder casting from lower cylinder, reinsert shaft aligner, replace cup and washer, replace and tighten 1/2" loc nut, hold shaft above during tightening process with pipe wrench. Center punch end of the shaft where sel loc is, in order to upset thread. This will eliminate any further backing off of nut.

### SUBJECT: *BREAKING OF BOTTOM ALUMINUM ALIGNER WHEEL*

This is caused by mishandling unit during the loading operation when tire is thrown in mold. The bottom aligner wheel and center shaft should be down but most important *DO NOT SLAM*



*TIRE AND RIM IN MOLD.* Pick it up and set it in. This may take a fraction of a second longer but you will not notice it. If this is followed you will have no further breakage of bottom wheels.

SUBJECT: *BENDING 5/8 CENTER SHAFT IN ALIGNER*

We believe that the bending of this shaft comes in loading of mold. The 5/8 shaft as well as bottom aligner wheel should be down in loading and again we cannot stress too strongly that caution should be used in loading mold. *DO NOT THROW TIRE AND RIM IN.* We feel that if this is followed you will have no more bending of shaft.

Very truly yours,

TRUTRED TIRE MOLDS INC.

L. T. Fike

Vice President

LTF:as

cc: Anderson, LA

Anderson, Chi.

Anderson, Dallas

Tire Ind., Akron

Eastern Tire, N.J.

Westside, N.J.

Farwest, Seattle

EXHIBIT 17

## APPENDIX B

Dec. 29, 1964

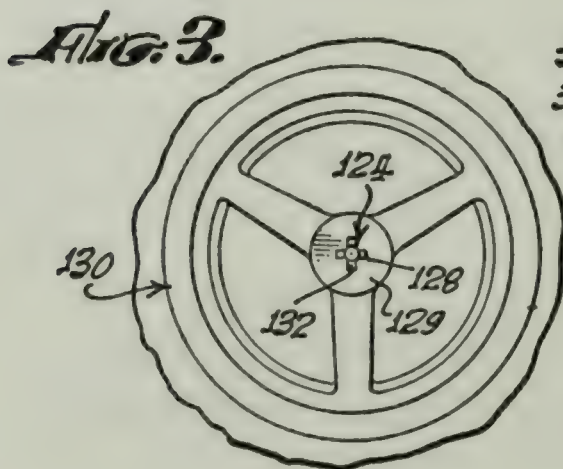
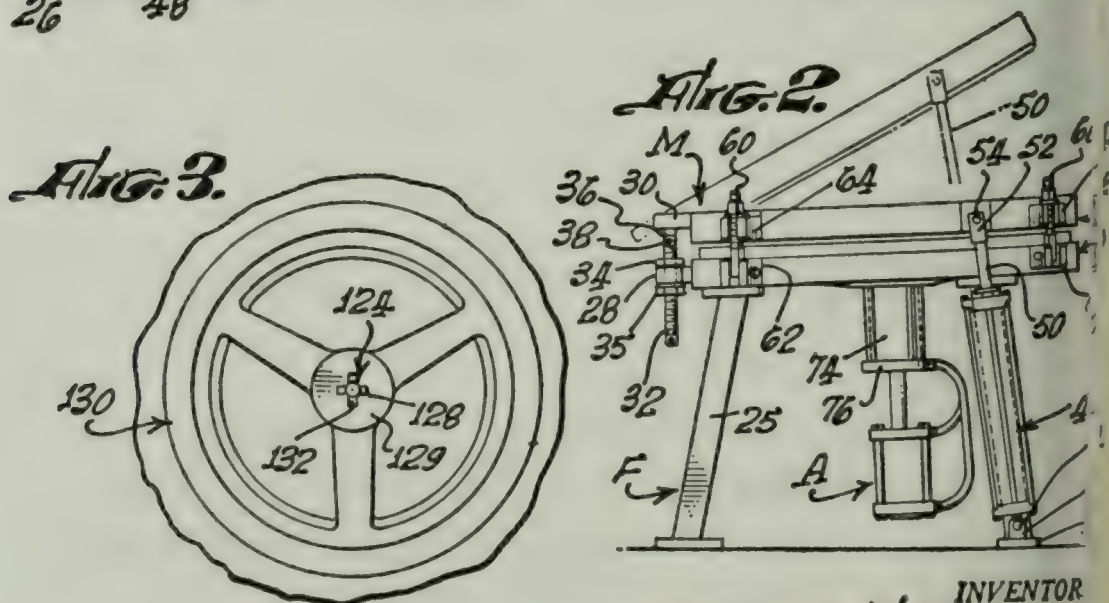
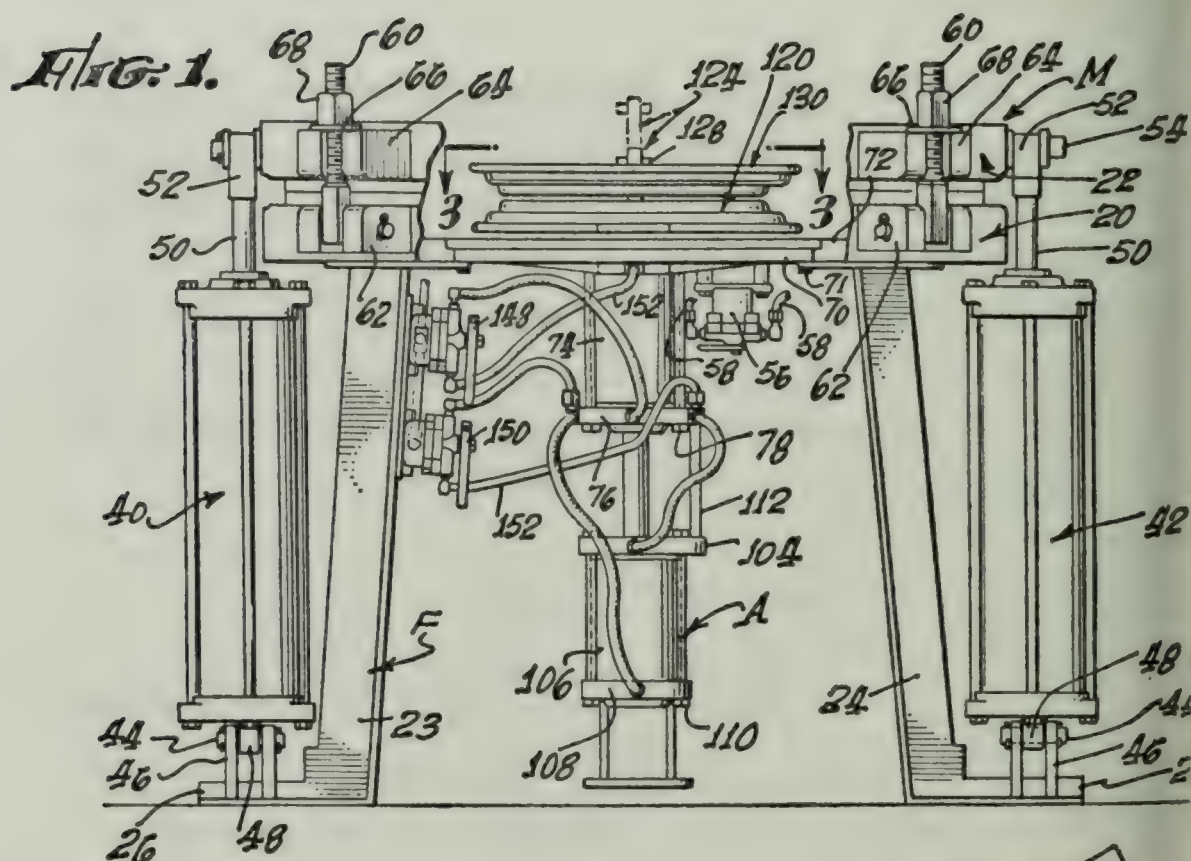
**L. T. FIKE**

**3,162,898**

# APPARATUS FOR USE IN RETREADING TIRES

Filed Oct. 29, 1959

3 Sheets-Sheet 1



INVENTOR  
LOUIS T. PIKE,

BY  
*Sulwider, Mattingly & Huntley*  
 ATTORNEYS

Dec. 29, 1964

L. T. FIKE

3,162,898

APPARATUS FOR USE IN RETREADING TIRES

Oct. 29, 1959

3 Sheets-Sheet 2

FIG. 4.

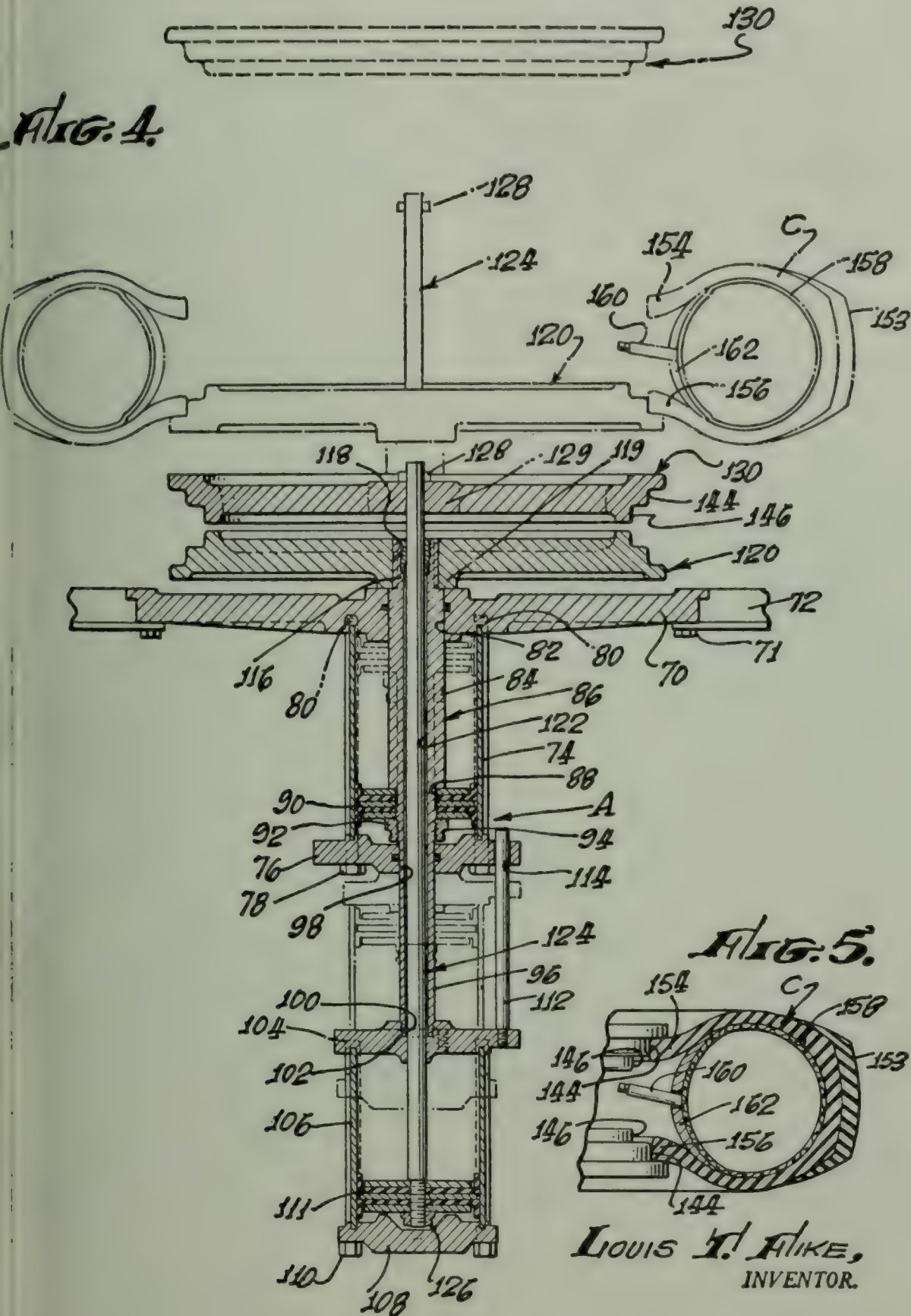


FIG. 5.

LOUIS T. FIKE,  
INVENTOR.

BY  
Fulwider, Mattingly & Huntley  
ATTORNEYS.



Dec. 29, 1964

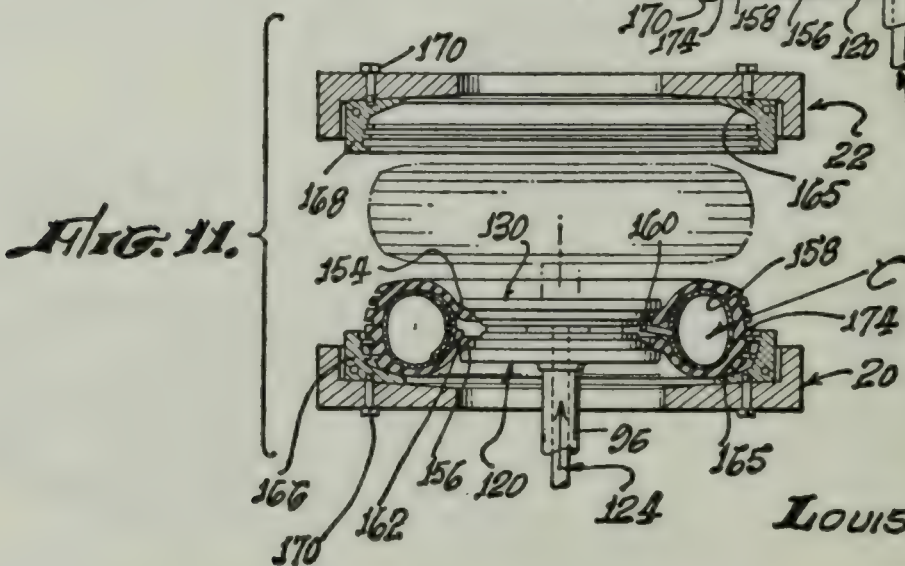
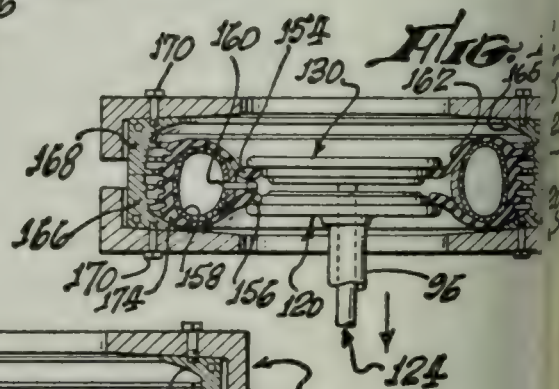
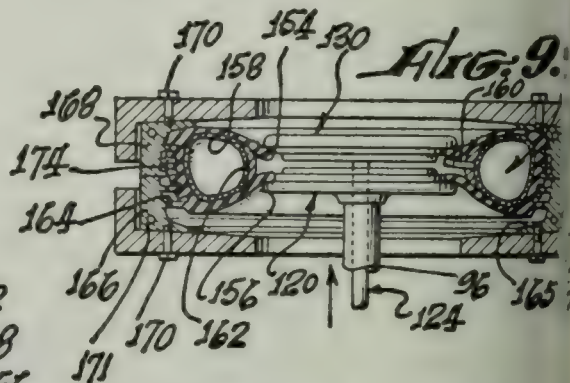
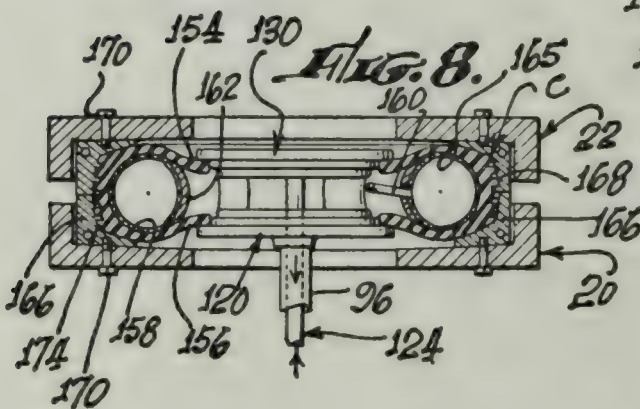
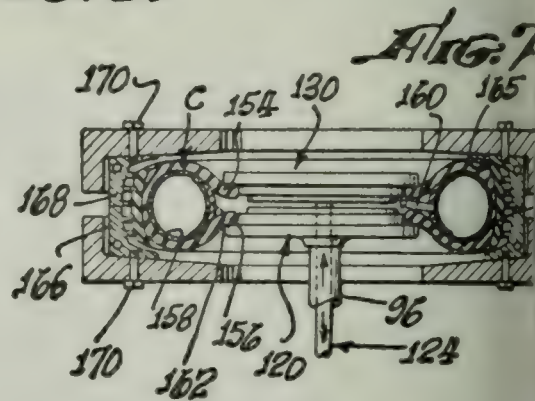
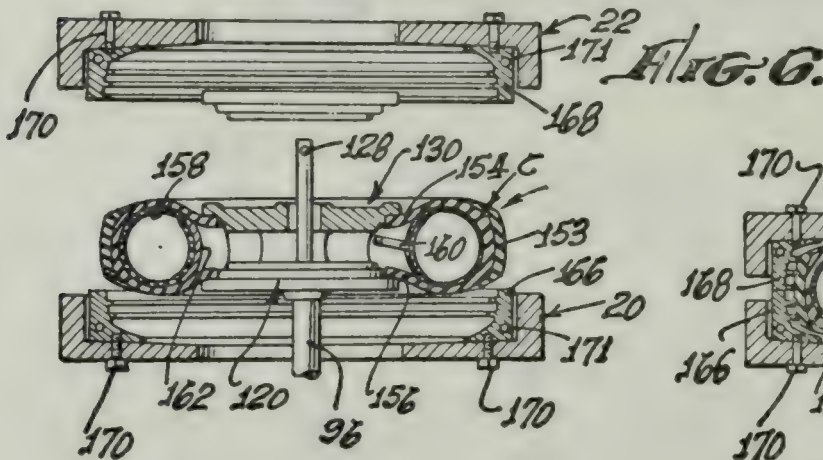
L. T. FIKE

3,162,898

APPARATUS FOR USE IN RETREADING TIRES

Filed Oct. 29, 1959

3 Sheets-Sheet



LOUIS T. FIKE  
INVENTOR

BY  
Fulwider, Mattingly  
Huntley  
ATTORNEYS



# United States Patent Office

3,162,898

Patented Dec. 29, 1964

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3,162,898

## APPARATUS FOR USE IN RETREADING TIRES

W. T. Fike, Los Angeles, Calif., assignor, by mesne assignments, to Super Mold Corporation of California, Inc., a corporation of California

Filed Oct. 29, 1959, Ser. No. 849,550

12 Claims. (Cl. 18—18)

The present invention relates generally to tire retreading apparatus and is particularly directed to apparatus which will consistently provide retreaded tires having uniform treads.

Generally, in retreading a worn tire casing the outer surface of such casing is first buffed with a wire brush or the like. Then a band of unvulcanized rubber is adhered to the outer periphery of the tire casing and a mold half is positioned within the matrix of a mold. The mold half heats the casing so as to bond the unvulcanized band thereto, with the radially inwardly extending ribs of the matrix also forming treads in the casing during the heating operation.

A representative mold usable with the apparatus embodying the present invention includes upper and lower mold halves that are pivotally connected at their rear portions. Each half is provided with a matrix half, the latter being radially inwardly engaging the upper and lower portions of the casing during the heating operation. The diameter of the cavity defined by the upper and lower matrix halves corresponds to the outer diameter of the retreaded tire, with the matrix ribs extending radially inwardly beyond the outer diameter of the unvulcanized band. The purpose of the present invention serves to initially reduce the diameter of the casing in order that the latter may be positioned within the confines of the cavity defined by the matrix in exact horizontal alignment with the tire. This eliminates any possibility of the casing being positioned crookedly relative to the matrix. It has been determined that misalignment of the casing relative to the matrix as the casing is positioned within the cavity is a primary cause of crooked treads in the retreaded tire. The two halves of the mold are locked against vertical separation during the heating operation by suitable lock means. The aforementioned reduction in casing diameter provided by the present apparatus permits these lock means to be readily applied to the mold halves. During the heating operation the apparatus of the present invention positively maintains the casing aligned with the matrix so as to assure uniform treads on the completed tire. After the casing has been heated so as to form the treads thereon, the apparatus of the present invention serves to break the casing loose from the matrix halves in order that the completed retreaded tire may be readily removed from the matrix. In this apparatus lifts the upper mold half free of the lower mold half and thereafter effects upward ejection of the completed retreaded tire from the lower matrix half.

It is a major object of the present invention to provide an improved apparatus for use with a heating mold in retreading a tire.

A further object of the present invention is to provide an apparatus of the aforescribed nature adapted to effect radial and vertical movement of a casing relative to a matrix during a tire retreading operation.

An additional object of the present invention is to provide an apparatus for use with a retreading mold having upper and lower halves, with such apparatus effecting movement of the upper mold half relative to the lower half, thereby effecting radial and vertical movement of the casing relative to the mold's matrix.

A further object is to provide apparatus of the aforescribed nature which permits the mold halves to be locked together by lock means without requiring a sepa-

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rate press for exerting a squeezing force upon such mold halves.

It is another object of the present invention to provide apparatus of the aforescribed nature which is relatively simple of construction and rugged of design whereby it may afford a long and trouble-free service life.

Yet an additional object of the present invention is to provide apparatus of the aforescribed nature which is economical and foolproof of operation, and which affords a considerable savings in the time required to effect a tire retreading operation.

These and other objects and advantages of the present invention will become apparent from the following detailed description when taken in conjunction with the appended drawings wherein:

FIGURE 1 is a front elevational view of a preferred form of apparatus embodying the present invention;

FIGURE 2 is a side elevational view in reduced scale showing said apparatus;

FIGURE 3 is a top plan view of a top bead ring utilized in said apparatus;

FIGURE 4 is a central vertical cross-sectional view showing the tire casing engaging portion of said apparatus;

FIGURE 5 is a fragmentary vertical sectional view showing a tire casing to be retreaded by said apparatus and an air bag utilized to hold such casing expanded within a matrix; and

FIGURES 6 through 11 are central vertical sectional views showing the mode of operation of said apparatus.

Referring to the drawings and particularly FIGURES 1 and 2 thereof, a preferred form of apparatus embodying the present invention includes a mold M having a fixed lower half 20 and a movable upper half 22. The lower mold half 20 is rigidly affixed to the upper end of a frame F having plurality of legs (preferably three) designated 23, 24 and 25. The lower portion of the legs are provided with horizontally extending feet 26. The rear portion of the lower mold half 20 is formed with a lug 28. The lug 28 is in vertical alignment with a complementary lug 30 formed on the upper mold half 22 when the two halves are in overlying relationship. The lug 28 supports the lower portion of a generally vertically extending externally threaded adjustment post 32, with adjustment nuts 34 and 35 being provided for such post immediately above and below this lug. The upper portion of the adjustment post 32 is hingedly affixed to a pin 36 that depends from the lug 28 by a horizontal pin 38 whereby the upper mold half 22 may have its front end pivoted upwardly to the open position shown in phantom outline in FIGURE 2. The adjustment post 32 permits the spacing between the upper and lower mold halves to be adjusted to compensate for the particular thickness of the tire matrix utilized with the mold M.

Inasmuch as the upper mold half 22 is of heavy construction, power-operated means are provided to effect movement of the upper mold half between its closed position shown in solid outline in FIGURE 2 and its open position shown in phantom outline therein. Such power-operated means takes the form of a pair of air operated cylinder and piston units 40 and 42 disposed at opposite sides of the front legs 23 and 24. The lower end of each cylinder is pivotally affixed to the foot 26 of its respective leg by means of horizontally extending pivot pins 44. The pivot pins 44 extend between upstanding bifurcations 46 formed on each foot and a depending ear 48 formed at the lower central portion of each cylinder. A piston rod 50 extends upwardly out of each of the cylinders and piston units. The upper end of each piston rod 50 is affixed to a bearing element 52. Both bearing elements pivotally receive a horizontally extending pin 54, with such pins extending horizontally outwardly from the opposite sides of the upper mold half 22. Air is



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admitted to and discharged from cylinder and piston units 40 and 42 by conventional means. Thus, there is provided a three-way valve 56 connected to a source of pressurized air (not shown). This valve 56 is mounted at the front right-hand portion of the lower mold half 20 at a point spaced below such lower mold half. The valve 56 is connected to the upper and lower ends of the cylinders and piston units by suitable flexible conduits 58.

It generally requires approximately 45 minutes for a casing to be cured within the mold M. Accordingly, it is desirable to use means other than the cylinder and piston units 40 and 42 to maintain the upper mold half 22 locked tightly against the lower mold half 20 during the curing operation. Accordingly, suitable lock means such as a plurality of lock bolts 60 are interposed between the upper and lower mold halves. The lower ends of the lock bolts 60 are pivotally mounted between radially extending bifurcations 62 formed on the periphery of the lower mold half 20. The intermediate portion of these lock bolts 60 are received between complementary bifurcations 64 which extend radially outwardly from the upper mold half 22. The bifurcations 62 and 64 are rigidly affixed at their radially inner ends to their respective mold halves. The upper portion of each lock bolt 60 is adapted to receive a washer 66 and a nut 68. When the lock bolts 60 are swung upwardly to their position shown in FIGURE 1, the nuts 68 will be tightened so as to lock the upper mold half 20 against upward separation from the lower mold half 20. Various other lock means may be utilized in lieu of the aforescribed, as for example, a circumferential clamp of the type shown in Patent No. 2,903,742, issued September 15, 1959.

The apparatus of the present invention also includes aligner unit A that is centrally disposed relative to the mold M. Referring now additionally to FIGURES 3 and 4, the adapter unit A includes an adapter disc 70, the radially outer end of which is rigidly affixed by bolts 71 to horizontally extending arms 72 formed on the upper end of the legs 23, 24 and 25. The adapter disc 70 is therefore fixed relative to the frame F. An upper, fixed fluid cylinder 74 depends coaxially from the adapter disc 70. The lower end of this upper cylinder 74 is closed by means of a closure plate 76. This closure plate 76 is held fixed relative to the lower end of the upper cylinder by means of a plurality of vertically extending tie bolts 78, the upper ends of such tie bolts being threaded into sockets 80 formed in the adapter disc 70.

The adapter disc 70 is centrally formed with a bore 82. This bore 82 slidably receives the upper portion 84 a vertically extending, generally tubular shaft, generally designated 86. The intermediate portion of this shaft 86 is formed with a recess 88 for receiving an upper piston 90. This piston 90 is vertically slidably disposed within the upper cylinder 74. The lower end of the piston 90 is retained in place by means of a retaining nut 92, the latter engaging threads 94 formed on the shaft 86 below the recess 88. The portion of the shaft 86 below the threads 94 is of reduced diameter as compared to the upper portion 84 of the shaft. This lower shaft portion 96 vertically slidably extends through a coaxial bore 98 formed in the closure plate 76. The lower end of the shaft 86 is formed with threads 100. These threads 100 are engaged with complementary threads formed in a socket 102 that is coaxial with a plug 104. The plug 104 defines the upper closure of a lower fluid cylinder 106. The lower end of the lower cylinder 106 is closed by a bottom closure plate 108. The bottom closure plate 108 is held in place by means of a plurality of tie bolts 110. The upper ends of these tie bolts 110 are threadably received by the plug 104. A lower piston 111 is vertically slidably disposed within the lower cylinder 106.

The plug 104 is rigidly affixed to the lower end of a plurality of upstanding guide rods 112. The guide rods 112 are vertically slidably received within complementary

guide holes 114 formed in the radially outer portion of the bottom closure plate 108. With this arrangement, vertical reciprocation of the shaft 86 will be directly transferred to the lower cylinder 106 whereby the shaft 86 will undergo reciprocation concurrently with the shaft 112.

The upper end of the shaft 86 is formed with a neck 116. This neck 116 telescopically receives the bore 118 formed in the hub 119 of a lower bead wheel 120. Accordingly, vertical movement of the shaft 86 will be directly transferred to this lower bead wheel 120.

The bore 122 of the tubular shaft 86 vertically receives a rod generally designated 124. The upper end of this rod 124 is affixed to the lower piston 111 by means of a nut 126.

The upper end of the rod 124 is formed with a stop pin 128 that extends radially outwardly from opposite sides of the rod. The upper end of the rod 124 is removably engageable with the hub 129 of a lower bead wheel 130. Thus, referring to FIGURE 3 the hub 129 is provided with a horizontally extending slot 132 that is slightly larger in dimensions than the stop pin 128. Accordingly, when the slot 132 is aligned with the stop pin 128, the hub 129 may be lowered over the upper end of the rod 124. Thereafter, the upper bead wheel may be rotated 90 degrees to its position shown in FIGURE 3 and upward movement of the rod 124 will then be transferred to the upper bead wheel 130.

Preferably, the upper and lower bead wheels 120 and 130 will be usable with two or more tire casing sizes. Accordingly, as indicated in FIGURES 4 and 5, each bead wheel is formed with a first annular groove 144 adapted to receive a first tire size, as for example, a 15 inch tire. Radially inwardly of each groove 144 is formed a second annular groove 146 of lesser diameter. This second groove 146 is adapted to receive a smaller diameter tire, as for example, a 14 inch tire.

Air is supplied to the interior of the upper and lower cylinders 74 and 106 by means of a pair of conventional air valves 148 and 150, respectively. As indicated in FIGURE 1, these air valves 148 and 150 may be affixed to the leg 23 of the frame F. These air valves receive pressurized air from a suitable source (not shown). The air valves 148 and 150 are connected to the upper and lower interiors of the upper and lower cylinders 74 and 106 by suitable flexible conduits in a conventional manner.

In the operation of the aforescribed apparatus, the casing C to be retreaded and its adhered unvulcanized band 153 is first positioned upon the lower bead wheel 120. At this time the upper bead wheel 130 will be disposed upon the rod 124, as indicated by the phantom outline in FIGURE 4. Additionally, it is preferable that the rod 124 be in a lowered position so as to facilitate positioning the casing C upon the lower bead wheel 120. After the casing C has been positioned upon the lower bead wheel, the upper bead wheel may be slipped downwardly over the upper end of the rod 124 by aligning the stop pin 128 with the slot 132. Thereafter, the upper bead wheel 130 is rotated 90 degrees to its position shown in FIGURE 3. At this time the beads 154 and 156 of the casing C will be disposed within the annular groove 144 of the upper and lower bead wheels. A conventional curing bag 158 having a valve stem 160 is disposed within the casing C prior to the time that the top bead wheel 130 is attached to the rod 124. A conventional curing ring encircles the radially inwardly facing portion of the bag 158.

Next, the top bead wheel 130 is caused to move downwardly by admitting pressurized air to the upper interior of the lower cylinder 106. During downward movement of the upper bead wheel 130, the lower bead wheel 120 will be maintained in its elevated position of FIGURE 3. Accordingly, the beads 154 and 156 will be squeezed together whereby the outer diameter of the casing C is reduced. The upper and lower bead wheels are



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downwardly while remaining in their closely relationship whereby the casing C will be positioned within the matrix halves, the outer periphery of the casing clearing the ribs 164 of the matrix halves. After casing C has been disposed within the matrix cavity a flow of pressurized air to the upper and lower ends may be discontinued. The upper bead wheel is then rotated 90 degrees so as to release it from the end of the rod 124. Pressurized air is then added to the upper interior of the upper cylinder 74 so as to pull the lower bead wheel 120 downwardly away from the casing.

The matrix halves 166 and 168 are rigidly supported in the lower and upper mold halves 20 and 22, respectively, as by means of a plurality of bolts 170. During a curing operation these matrix halves will be heated by suitable means to a temperature approximating 300 degrees F. This heat may be provided by means of tubes 171 extending through the matrix halves. Alternatively, electric resistant heating elements may be used in conjunction with the matrix halves to effect heating.

Referring to FIGURE 7, at such time as the casing C is positioned within the lower matrix half 166 the upper mold half 22 will be lowered so as to place the matrix half 168 in abutment with the lower matrix half. This may be accomplished by means of the aforescribed rod and piston units 40 and 42. It is next necessary to lock the upper and lower mold halves together by means of the aforescribed lock bolts 60. This is preferably accomplished while the casing C is still maintained in its reduced diameter position of FIGURE 7. In this position with the casing in its reduced diameter position the upper matrix half 168 will readily abut the lower matrix half 166. It is therefore unnecessary to supply special means for effecting such abutment as the mold halves are being locked together.

Referring now to FIGURE 8, after the lock bolts 60 are manipulated so as to rigidly secure the mold halves together the upper and lower bead wheels 120 and 130 will undergo vertical separation. Accordingly, the casing will return to its normal relaxed diameter. Preferably, the matrix halves 166 and 168 will be heated during this time to a curing temperature.

At the conclusion of the curing operation it is necessary to loosen the treads 174 formed in the retreaded casing from the matrix ribs 164. To accomplish this the upper bead wheel 130 is first rotated 90 degrees to its position of FIGURE 3. Thereafter, as indicated in FIGURE 9, the lower bead wheel 120 is moved upwardly to effect concurrent upward movement of the lower casing bead 154. During such upward movement of the lower bead wheel 120, the upper bead wheel 130 is rotated against upward movement. The upward movement of the lower bead wheel is effected by admitting pressurized air to the lower interior of the upper cylinder 74. The upper bead wheel may be locked against upward vertical movement by admitting pressurized air to the upper interior of the lower cylinder 106. The lower interior of the lower cylinder 106 contains air at a lower pressure at this time, and hence the lower cylinder 106 may move upwardly while the lower rod 1 and rod 124 remain stationary. The upward movement of the lower bead wheel will continue until the force from the pressurized air is exceeded by the force of the lower casing bead 154 against further upward movement, as indicated clearly in FIGURE 9. The upward movement of the casing beads 154 and 156 will then pull the treads 174 formed in the lower half of the casing free of the matrix ribs 164 of the lower matrix half 166.

Next it is necessary to break the treads 174 on the lower half of the casing C free of the matrix ribs 164. This may be accomplished by initially lowering the lower bead wheel 130 towards the lower bead wheel

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120 while the lower bead wheel remains fixed against downward movement. This may be accomplished by admitting pressurized air to the lower interior of the upper cylinder 74 and increasing the amount of pressurized air being admitted to the upper interior of the lower cylinder 106. This serves to squeeze the casing beads 154 and 156 together. With the casing beads held in this squeezed-together relationship, both wheels may be moved upwardly. Thus, as indicated in FIGURE 10, the upper portion of the casing C will be broken free of the matrix with the treads 174 being pulled away from the matrix ribs 164.

Referring now to FIGURE 10, after the casing C has been broken free of the matrix ribs 164, the upper and lower bead wheels will continue to exert a squeezing pressure on the casing beads 154 and 156. Accordingly, the casing will remain in its reduced-diameter condition. The upper mold half 22 may then be raised by means of the cylinder and piston units 40 and 42. Thereafter, the completed casing may be ejected upwardly from its solid outline position of FIGURE 11 to its phantom outline position therein by means of the upper and lower bead wheels. In this regard these bead wheels will continue to exert a squeezing pressure on the casing beads 134 and 156 whereby the outer diameter of the casing will be maintained less than that of the matrix ribs 164. The completed casing may be readily removed from the apparatus by initially removing the upper bead wheel 130 from the rod 124.

It will be apparent that the aforescribed movements of the upper and lower bead wheels may be readily accomplished by proper manipulation of the air valves 148 and 150 whereby these valves will admit or discharge pressurized air from the upper and lower cylinders 75 and 106. It should also be particularly noted that the apparatus of the present invention will consistently provide retreaded casings having uniform treads. This is made possible because the casing will always be positioned in horizontal alignment with the matrix as the casing is disposed within the matrix cavity. Additionally, such results are made possible because the treads in the retreaded casing are completely broken-away from the matrix ribs prior to the time that the casing is ejected from the matrix. The aforescribed apparatus moreover permits the retreading operation to be carried out with a minimum amount of labor and the least expenditure of time.

Various modifications and changes may be made with regard to the foregoing detailed description without departing from the spirit of the present invention or the scope of the following claims.

I claim:

1. Tire casing retreading apparatus, comprising:

a frame;

a full capping type mold on said frame, said mold being formed with a cavity that receives a tire to be retreaded over its outer periphery and outer side walls;

a lower bead wheel coaxial with said cavity and engageable with the lower side of said tire casing;

first support means secured to said lower bead wheel;

first power-operated means on said frame secured to said first support means and operable to urge said

lower bead wheel vertically in both directions relative to said mold cavity under power;

an upper bead wheel coaxial with said cavity and engageable with the upper side of said tire casing with said bead wheels when disposed in close vertical proximity effecting the reduction in diameter of said tire casing to less than the diameter of said mold cavity;

second support means;

readily detachable connection means between said

upper bead wheel and said second support means;

and second power-operated means carried by said



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frame secured to said second support means and operable to urge said upper bead wheel vertically in both directions relative to said mold cavity under power either concurrently with or independently of said lower bead wheel.

2. Apparatus as set forth in claim 1 wherein said power-operated means are of the fluid-actuated type.

3. Tire casing retreading apparatus, comprising: a frame; a full capping type mold on said frame, said mold being formed with a cavity that receives a tire to be retreaded over its outer periphery and outer side walls; a lower bead wheel coaxial with said cavity and engageable with the lower side of said tire casing; a vertical shaft secured to said lower bead wheel; first power-operated means on said frame secured to said vertical shaft and operable to urge said lower bead wheel vertically in both directions relative to said mold cavity under power; an upper bead wheel coaxial with said cavity and engageable with the upper side of said tire casing, with said bead wheels when disposed in close vertical proximity effecting the reduction in diameter of said tire casing to less than the diameter of said mold cavity; a vertical rod; readily detachable connection means between said upper bead wheel and said rod; and second power-operated means carried by said frame secured to said rod and operable to urge said upper bead wheel vertically in both directions relative to said mold cavity under power either concurrently with or independently of said lower bead wheel.

4. Apparatus as set forth in claim 3 wherein said shaft is hollow and said rod is slidably telescopically disposed within said shaft.

5. Apparatus as set forth in claim 3 wherein said power-operated means are of the fluid-actuated type.

6. Tire casing retreading apparatus, comprising: a frame; a mold on said frame, said mold being formed with a cavity that receives a tire to be retreaded over its outer periphery and outer side walls; a lower bead wheel coaxial with said cavity and engageable with the lower side of said tire casing; a hollow vertical shaft secured to said lower bead wheel; fluid-actuated cylinder and piston means on said frame secured to said shaft and operable to urge said lower bead wheel vertically in both directions relative to said mold cavity under power; an upper bead wheel coaxial with said cavity and engageable with the upper side of said tire casing, with said bead wheels when disposed in close vertical proximity effecting the reduction in diameter of said tire casing to less than the diameter of said mold cavity; a vertical rod telescopically vertically slidably disposed within said shaft; readily detachable connection means between said upper bead wheel and said rod; and second fluid-actuated cylinder and piston means carried by said frame secured to said rod and operable to urge said upper bead wheel vertically in both directions relative to said mold cavity under power either concurrently with or independently of said lower bead wheel.

7. Tire casing retreading apparatus, comprising: a frame; a lower mold half fixed relative to said frame and formed with a lower cavity half that receives a tire casing to be retreaded over its outer periphery and outer side walls; an upper mold half movably attached to said lower mold half whereby it may be raised thereabove to receive said casing, said upper mold half being formed with an upper cavity half coaxial with said lower cavity half during a molding operation; power-driven means operatively interposed between said frame and said upper mold half to raise the latter relative to said lower mold half; releasable lock means securing said lower and upper mold halves together; a lower bead wheel coaxial with said cavity halves and engageable with the lower side of said casing; first support means secured to said lower bead wheel; first power-operated means on said frame secured to said first support means and operable to urge said lower bead wheel vertically in both directions relative to said

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power cavity under power; an upper bead wheel with said lower cavity and engageable with the upper side of said casing, with said upper and lower bead wheels when disposed in close vertical proximity effecting the reduction in diameter of said tire casing to less than the diameter of said cavity halves; second support means connected to said upper bead wheel; and second power-operated means carried by said frame secured to said second support means and operable to urge said upper bead wheel vertically in both directions relative to said lower cavity under power either concurrently with or independently of said lower bead wheel.

8. Apparatus as set forth in claim 7 wherein said first support means includes a vertical hollow shaft and said second support means includes a vertical rod telescopically slidably disposed within said shaft.

9. Apparatus as set forth in claim 7 wherein said power-operated means are of the fluid-actuated type.

10. In tire casing retreading apparatus that includes a fixed frame, and a full capping type mold on said frame formed with a cavity that receives a tire casing to be retreaded over its outer periphery and outer side walls, the combination of: a lower bead wheel coaxial with said cavity and engageable with the lower side of said tire casing; a vertical shaft secured to said lower bead wheel; first power-operated means on said frame operable to urge said shaft vertically in both directions under power whereby said lower bead wheel is movable from within said cavity to a point exterior of said cavity; an upper bead wheel coaxial with said cavity and engageable with the upper side of said casing, with said upper and lower bead wheels when disposed in close vertical proximity effecting the reduction in diameter of said tire casing to less than the diameter of said cavity; a vertical rod movably secured to said upper bead wheel; and second power-operated means operatively supported by said frame connected to said rod and operable to urge said upper bead wheel vertically in both directions relative to said cavity under power either concurrently with or independently of said lower bead wheel.

11. Apparatus as set forth in claim 10 wherein said power-operated means include coaxial fluid-actuated cylinder and piston means.

12. Apparatus as set forth in claim 11 wherein said shaft is hollow and said rod is slidably telescopically disposed within said shaft.

**References Cited by the Examiner**

**UNITED STATES PATENTS**

50	2,272,231	2/42	Voth	—18
	2,302,133	11/42	Maze	—18
	2,697,853	12/54	Smyser	—18
	2,728,945	1/56	Clapp	—18
	2,734,225	2/56	Glynn	—18
55	2,812,547	11/57	Duerksen et al.	—18
	2,915,783	12/59	Fassero et al.	—18
	2,921,337	1/60	Frohlich et al.	—18
	2,948,924	8/60	Clapp	—18
	2,987,770	6/61	Powell	—18

**References Cited by the Applicant**

**UNITED STATES PATENTS**

60	1,662,035	3/28	Smith et al.	
	1,750,867	3/30	Smith et al.	
65	2,443,955	6/48	Guzik.	
	2,593,137	4/52	Glynn.	
	2,639,466	5/53	Glynn.	
	2,672,651	3/54	Smyster.	
	2,835,921	5/58	White.	
70	2,866,228	12/58	French.	
	2,936,484	5/60	Lawson.	
	2,942,295	6/60	Duerksen et al.	

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Nos. 21752 and 21752A

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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No. 21752

SUPER MOLD CORPORATION, a corporation,

*Appellant,*

*vs.*

CLAPP'S EQUIPMENT DIVISION, INC., a corporation,

*Appellee.*

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No. 21752A

CLAPP'S EQUIPMENT DIVISION, INC., a corporation,

*Appellant,*

*vs.*

SUPER MOLD CORPORATION, a corporation,

*Appellee.*

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## BRIEF OF APPELLEE, CLAPP'S EQUIPMENT DIVISION.

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## TABLE OF AUTHORITIES CITED

Cases	Page
Aerovox Corporation v. Polymet Mfg. Corporation, 67 F. 2d 860 .....	22
Akron Brass Company v. Elkart Brass Manufactur- ing Co., 353 F. 2d 704 .....	26
Cataphote Corp. v. De Soto Chemical Coatings, Inc., 356 F. 2d 24 .....	17, 19, 22, 23
Egbert v. Lippman, 104 U.S. 333 .....	26
Elizabeth v. Am. Nich. Pavement Co., 97 U.S. 126 .....	30, 31
Honolulu Oil Corporation v. Shelby Poultry Com- pany, 293 F. 2d 127 .....	28, 29
International Tooth Crown Co. v. Gaylord, 140 U.S. 55 .....	24
Koehring Company v. National Automatic Tool Company, 362 F. 2d 100 .....	19, 22, 28
Merrill v. Builders Ornamental Iron Co., 197 F. 2d 16 .....	30, 31
National Biscuit Co. v. Crown Baking Co., 105 F. 2d 422 .....	20
Park-In Theatres v. Perkins, 190 F. 2d 137 .....	18, 32, 33, 35
Pennock and Sellers v. Dialogue, 27 U.S. 1 .....	27, 28
Philco Corporation v. Admiral Corporation, 199 F. Supp. 797 .....	26
Piet v. United States, 176 F. Supp. 576 .....	25
Shingle Product Patents v. Gleason, 211 F. 2d 437 ..	33
Smith & Griggs Mfg. Co. v. Sprague, 123 U.S. 249 .....	23, 24, 34

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Tidewater Patent Development v. Kitchen, 371 F. 2d 1004 .....	35
Tool Research & Engineering Corp. v. Honcor Corp., 367 F. 2d 449 .....	24
Tucker Aluminum Products, Inc. v. Grossman, 312 F. 2d 293 .....	26
Universal Marion Corp. v. Warner and Swasey Co., 354 F. 2d 541 .....	29, 31
Wende v. Horine, 225 Fed. 501 .....	26

#### Statutes

United States Code, Title 35, Sec. 102(b) ....	2, 3, 4, 5
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United States Code, Title 35, Sec. 112 .....	28
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*Appellant,*  
*vs.*

SUPER MOLD CORPORATION, a corporation,  
*Appellee.*

---

**BRIEF OF APPELLEE, CLAPP'S  
EQUIPMENT DIVISION.**

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**Introduction.**

In these appeals, plaintiff-appellant (Super Mold herein) presents for review a judgment of the District Court granting defendant-appellee's (Clapp's Equipment herein) motion for summary judgment holding U.S. Patent No. 3,162,898, the single patent in suit, invalid because the alleged invention was in public use and on sale in this country more than one year prior to the date of application for patent. Clapp's Equipment



has appealed from the failure of the District Court to award it attorneys' fees.

The District Court found that there was no genuine issue as to any material fact [CT 325]. The findings of fact made by the District Court, and upon which it based its determination that the acts prior to the critical date were invalidating under 35 U.S.C. Sec. 102(b), are unchallenged by Super Mold in its brief. It could hardly be otherwise, since these findings are predicated upon Super Mold's own documents, its own admissions and answers to interrogatories, and the deposition testimony of its own officers.

Against the extensive contemporaneous documentation and other evidence in this record showing nothing less than conspicuous commercial transactions in the patented assembly prior to the critical date, Super Mold in its arguments pits the present statement by the inventor, now Super Mold's president, of his subjective motivation at the times the acts took place. It asks this Court to treat this present statement of motivation, standing alone, as determinative of the nature of the acts at issue, irrespective of the quality of the other evidence in the record. Alternatively, it asserts that, because the inventor now states that his motivation in selling about 250 of the patented apparatus for over \$40,000 was for experimental purposes, this of itself creates a genuine issue of fact.

It is a purpose of this brief to show that, based upon the totality of the undisputed material evidentiary facts in this record, the District Court correctly determined that the conduct prior to the critical date involved invalidating public and commercial acts which had as their purpose commercial exploitation of the later patented

apparatus. It is a further purpose of this brief to show that the commercial activity prior to the critical date, the facts of which were all known to Super Mold prior to its institution of this suit, was of such a magnitude that there could not have been any reasonable belief in the validity of the patent when the suit for patent infringement was instituted. Therefore, the case is an exceptional case within the meaning of 35 U.S.C. Sec. 285, justifying an award of reasonable attorneys' fees.

### **Statement of the Case.**

#### **The Questions Presented.**

As to the appeal taken by Super Mold, the questions presented are:

1. Is there any genuine issue as to any material evidentiary fact?
2. From the totality of the evidence in the record, was the District Court correct in concluding that the activities prior to the critical date of October 29, 1958 with respect to uses and sales of the later patented apparatus placed the alleged invention in public use and on sale in this country more than one year prior to the date of application in the United States and therefore invalidated the patent under 35 U.S.C. Sec. 102(b)?

As to the appeal taken by Clapp's Equipment, the question presented is:

1. With full knowledge of the facts of record, was not Super Mold's conduct in instituting a suit based upon the patent at issue so unreasonable as to make this an exceptional case justifying the award of attorneys' fees?



### **The Patented Subject Matter.**

The application on which the patent in suit issued on December 29, 1964 was filed in the U.S. Patent Office on October 29, 1959 in the name of Louis T. Fike as inventor. The application was assigned to Trutred Tire Molds, Inc. (Trutred herein), a company of which Mr. Fike was General Manager and Vice President from 1952 to 1960. In 1960, Trutred was purchased by Super Mold and the patent application was assigned to Super Mold. Mr. Fike became General Manager of the Trutred Division of Super Mold at the time of the acquisition and has continued with Super Mold since that time. In January 1964, Mr. Fike became President of Super Mold [Fike Depo.: pp. 3-5].

As shown and described in the Super Mold brief (pp. 6-10), the claimed apparatus of the patent in suit is a tire retreading apparatus which is used to provide new treads in worn tires, a procedure commonly referred to as "recapping". The subject matter which was patented was an apparatus consisting of the combination of a tire retreading mold and a specified type of tire bead aligner or tread aligner. There is no dispute that the activities of Trutred prior to the critical date involved the same apparatus as that claimed in the patent, since Super Mold has admitted this to be the case.

### **The Activities of Trutred Prior to the Critical Date.**

Since the application on which the patent in suit issued was filed on October 29, 1959, the critical date under 35 U.S.C. Sec. 102(b) is October 29, 1958.

In April and May, 1958, Trutred installed and operated two prototypes of the patented apparatus at the



retreading plant of Sears Roebuck and Company (Sears herein) in Los Angeles and was paid by Sears for at least one of the prototypes. Then, pursuant to a Sears purchase order issued in June, 1958, Trutred delivered about 250 of the patented apparatus to seven Sears tire retreading plants in various parts of the country and was paid over \$40,000 for the sale. In addition, Trutred advertised the patented apparatus in trade journals, exhibited the patented apparatus at a trade convention at which its operation was demonstrated and prices for its purchase were quoted, and offered one of the patented apparatus as a door prize at the trade convention.

Each of the events summarized above occurred prior to the critical date. Super Mold has admitted that the apparatus involved in each of these events was the same apparatus as that claimed in the patent. As will be discussed in the argument of this brief, the prototype use and sale, the \$40,000 sale to Sears, and the advertising and exhibiting activities separately constitute invalidating acts under 35 U.S.C. Sec. 102(b). In combination, they reveal an unmistakable pattern of commercial exploitation.

*Trutred's Activities Prior to  
the \$40,000 Sale to Sears.*

Trutred had since 1952 been in the business of manufacturing retreading equipment including molds [Fike Depo.: p. 5]. One of its important customers was Sears. Trutred sold molds for tire retreading to plants which did retreading of tires for Sears stores. Because the acquisition of such equipment constituted a significant capital expenditure, equipment for such retreading plants, which were located in various parts

of the country, was purchased and paid for by Sears. Mr. H. A. Barron of Sears acted in a liaison capacity between Sears and the retreading plants. As to Mr. Barron's function, Mr. Fike testified as follows [Fike Depo.: pp. 15-16]:

“Q. Who made the decision as to what equipment was to be installed? A. I am sure Mr. Barron had something to do with it. It basically would be whether the plants desired it and whether it was satisfactory for what they needed done.”

As of about 1957, somewhere between 200 and 250 Trutred molds were in operation at the various retreading plants supplying Sears stores [Fike Depo.: p. 17].

Mr. Fike testified that in early 1958 retreading of lighter tire casings encountered a problem of crooked treads [Fike Depo.: pp. 12-13]. In this connection, Trutred had in 1957 supplied to Sears early versions of bead aligners for use in Trutred molds at the Sears plants [Fike Depo.: pp. 18-22; Exs. 6, 7, 8, CT 203-205]. Because of the continuing problem of crooked treads, Sears in February 1958 solicited bids from various companies for installation of bead aligners in its retreading molds. Mr. Fike testified as follows with respect to this solicitation by Sears [Fike Depo.: pp. 23-24]:

“Q. Did you know that in the beginning of 1958 Sears requested bids for installation of bead aligners in approximately 250 molds used in Sears' retreading shops? A. Yes. ,

Q. How were you made aware of that? A. They were trying to find an answer to the crooked tires they were running, and we weren't coming



up with one very fast, so they attempted to go on the outside.

Q. Did this result in your activity in the development of the bead aligner which is shown in Exhibit G? . . . A. I don't really know. I just know that for some period of time they were having a problem, just as the industry was, and we were trying different devices to try to cure the problem. And finally there were some other devices on the market at that time that people were advertising, and they went out and requested bids to see if they could get something to cure the problem because we weren't getting there very fast.

Q. Were you concerned that if you did not provide the requested 250 bead aligners Sears would use other bead aligners in the molds provided by you? A. Yes, sir. We were very much concerned about Sears buying anything except from us."

Clapp's Equipment was a company from which Sears solicited a bid for 250 bead aligners in February 1958. In a letter of February 12, 1958 from Mr. H. A. Barron of Sears to Clapp's Equipment [Ex. J, CT 169], Mr. Barron stated:

"... Within the near future we plan to purchase 250 bead aligners for our various sources throughout the country. We would like to know if you have a representative in the Chicago area or if not, if you would be interested in submitting a quotation for your bead aligner on a quantity basis."

Mr. Fike testified that beginning about April 1958 he made prototypes of the retreading apparatus claimed



in the patent in suite. Two of these prototypes, one identified in his testimony as Unit No. 1 and the second as Unit No. 2, were operated at the retreading plant for Sears in Los Angeles [Fike Depo.: pp. 24-25]. Sears was invoiced by Trutred for payment for Unit No. 2 of the patented apparatus [Fike Depo.: p. 27]. This unit was, during May 1958, operated by the shop people at the point to retread tires. No reports on its operation were made by the shop people to Mr. Fike. The latter had free access to the unit and made whatever changes he observed to be needed [Fike Depo.: pp. 14, 29].

Following the work with Unit No. 2 at the Los Angeles retreading plant, Sears issued a purchase order dated June 16, 1958 to Trutred for 248 of the patented apparatus [Ex. 14, CT 211]. This purchase order is reproduced as Appendix A to this brief.

#### *The \$40,000 Sale to Sears.*

Mr. Fike's own testimony as to the purchase of 248 of the patented apparatus by Sears was as follows [Fike Depo.: p. 31]:

“Q. Now, the date of that purchase order is June 16, 1958. Can you give me the background of what led to that purchase order following the use of Unit No. 2 at Anderson Tires? A. As best as I can recall, it goes something like this. I would have told Jack Koplin that it looks like we are on the right track to curing the problem, and Jack would have gone from there to Sears. Now, sometimes I talked to Herb (Barron) at various times but pretty well officially talked through Jack.” (Parenthetical Note Added).

and further testified [Fike Depo.: pp. 32-33] as follows:

“Q. Why did you accept this purchase order to deliver 248 tread aligners to Sears as of June, 1958? Was it because you were going to be paid for it? A. Well, certainly.

Q. It was a commercial transaction, was it not? A. I guess all our actions with Sears could be commercial transactions, I suppose.

Q. And that included this particular one? A. Well, we received this purchase order from Sears and proceeded to try to equip the molds that basically were our molds, since they were in essence our account, with an item that we hoped would accomplish the job.”

The Sears purchase order was transmitted to Trutred by Mr. Barron's letter dated June 17, 1958, which included the following paragraph [Ex. 9, CT 206]:

“As we discussed by phone last Friday I would like you to exert every effort to have aligners ready for shipment to meet our initial requirements. I am very anxious to have aligners at our various shops when the new traction matrices arrive. As you know there is a great deal of pressure to get 14" Traction tires at the earliest possible date and I think we both agree that we do not want the lack of bead aligners to contribute to a delay in production.”

Mr. Fike acknowledged the order in a letter of June 18, 1958 to Mr. Barron and requested that inventory information as to the various plants be rushed to him so that Trutred could proceed with the Sears order



[Ex. 16, CT 213]. Trutred issued a formal Acknowledgment of Order, dated August 5, 1958 [Ex. 15, CT 212], giving a unit price of \$225 per unit before commercial and quantity discounts and a unit price of \$162 per unit after discount, the total cost being shown as \$40,176. The Acknowledgment of Order, which is reproduced as Appendix B to this brief, included a shipping schedule which stated: "Starting 8-11-58, 8 units per day, progressing to 20 per day until completion of order."

In fulfilling the Sears purchase order, Trutred began deliveries of the patented apparatus on July 30, 1958 and continued making shipments until the order was completed on November 5, 1958. All but six of the ordered quantity of 248 units were shipped by Trutred prior to the critical date. Following each shipment, Trutred issued invoices for payment by Sears, with a total of thirty-seven invoices being issued [Ex. F-1 through F-37, CT 221-257]. These invoices show, for example, that on August 21, 1958 twenty-five bead aligners were shipped, five each being sent to Sears plants at Seattle [Ex. F-3, CT 223]; Newark, N.J. [Ex. F-4, CT 224]; Chicago [Ex. F-5, CT 225]; Akron, Ohio [Ex. F-6, CT 226]; and Camden, N.J. [Ex. F-7, CT 227]. Additional shipments were subsequently made to these plants, as well as to the Sears plants at Dallas, Texas and Los Angeles, until the requirements of each plant were met. A representative invoice [Ex. F-12, CT 232] is reproduced as Appendix C to this brief.

Sales taxes were included for each sale to the Los Angeles plant and, as to the out-of-state shipments, each invoice stated: "No tax—out of state." Payment



for the apparatus was made by Sears prior to the critical date [Answer to Interrogatory No. 1(d), CT 177].

The bead aligners shipped by Trutred were installed in full capping retreading molds at the retreading plants for Sears stores. Mr. Fike testified that these units as delivered were used for commercial retreading of tires at these plants [Fike Depo.: p. 45].

Mr. Fike testified that modifications were made in some elements of the apparatus shipped to Sears pursuant to the above-described purchase order. These modifications were either as to size of elements of the patented apparatus, such as the upper and lower bead wheels, the piston rod, and the iron hub, or of the material of construction of these elements. He testified further that with the elements in the apparatus as delivered, the apparatus was operable to retread tires and was so used [Fike Depo.: pp. 35-43; 45-46]. It is undisputed that these changes in the patented apparatus made after the deliveries to the various Sears plants were not described and claimed in the patent. The apparatus delivered to Sears by Trutred was the very same as described and claimed in the patent, as was clearly brought out by the District Court at the hearing on the motion for summary judgment in the following colloquy between the Court and Super Mold's counsel, Mr. Utecht [Reporter's Transcript p. 21]:

“The Court: Let me understand you. Is there any dispute that the machines sold to Sears in the big sale involved the teachings that were finally incorporated in the patent? Not a different machine. It's the same machine.

Mr. Utecht: It's the same machine, same basic concept.

The Court: It did involve the teachings of the patent?

Mr. Utecht: That's right. . . ."

During the operation of the apparatus at the various Sears plants, no formal written reports were made to Trutred as to the operation of the apparatus [Answer to Interrogatory No. 1(f)(iii), CT 178]. Mr. Fike was informed by shop personnel in the event the apparatus broke down in operation [Fike Depo.: p. 46]. As to the bead aligners delivered to the Sears plants under the purchase order, no restriction of secrecy was placed upon Sears as to use or accessibility to the bead aligners [Answer to Interrogatory No. 11, CT 186].

Trutred's invoices which are in evidence show shipment of 133 units of the patented apparatus to seven Sears plants located in Los Angeles, Dallas, Seattle, Chicago, Newark, Akron, and Camden, New Jersey, during the month of August 1958 [Ex. F-2-F-20, CT 222-240]; shipment of 84 units to these various plants during the month of September 1958 [Ex. F-21-F-32, CT 241-252]; and shipment of 25 units to these various plants during the month of October 1958 [Ex. F-33-F-36, CT 253-256]. Between August 19, 1958 and November 5, 1958, therefore, Trutred shipped 248 units of the patented apparatus to the various Sears plants, for which units Sears was invoiced by Trutred and paid to Trutred \$40,176. It is this transaction which is now contended by Super Mold's president to have been for experimental purposes.



*Trutred's Advertising and Demonstration of the Patented Apparatus to the Trade.*

As the deliveries of the patented apparatus under the Sears purchase order were nearing an end, Trutred, prior to the critical date, embarked upon a campaign for the commercial promotion of the patented apparatus to the trade at large. It advertised the patented apparatus in issues of a trade publication, *Tire Battery and Accessory News*, in September, October, and November 1958 [Exs. 2, 3, and 4, CT 197-199]. In the September 1958 issue of the magazine [Ex. 1, CT 196], a listing of suppliers described Trutred's products as including "passenger mold with built-in bead aligner and tire ejector." In the October issue of this trade publication, the Trutred advertisement of the patented apparatus included the following statement: "Unconditional One-Year-Guarantee against defective material and workmanship." The page from the publication is reproduced as Appendix D to this brief. As to the purpose of these advertisements, Mr. Fike testified that it was intended to "attract attention to the unit" and that this purpose was accomplished by the advertisements [Fike Depo.: p. 55].

At the 38th Annual Convention of the National Tire Dealers and Retreaders held in Los Angeles October 11-October 15, 1958, Trutred was an exhibitor. Two of the patented apparatus, which in its October and November 1958 advertising were described by Trutred as "Star of the Show", were on display at the Trutred booth. Super Mold has admitted that the apparatus exhibited at the Trutred booth prior to the critical date incorporated the claimed elements of the patent in suit [Fike Depo.: p. 57]. The operation of these units



was demonstrated to show how the bead wheels were actuated by the cylinders. As to how the units were demonstrated, Mr. Fike testified as follows [Fike Depo.: p. 56]:

“Q. Did you staff the booth at the convention? A. Yes.

Q. Did you demonstrate the operation of the unit that is shown in Exhibit 2? A. I had an air line connected to the mold and would periodically work the device, but you couldn't demonstrate the total operation, no.

Q. You could not demonstrate the retreading itself? A. Oh, no.

Q. But insofar as the manner in which the bead wheels were actuated by the cylinders, was that demonstrated? A. Yes.”

During the prosecution in the Patent Office of the application from which the patent issued, the inventor had asserted that the nature of the actuation of the bead wheels by the cylinders (the power operated means) was the construction which differentiated the claimed apparatus from the prior art and which enabled performance of the sequence of operations described in the patent [Ex. E, CT 219]. In its answers to interrogatories, Super Mold described the nature of the demonstration at the convention as follows [Answer to Interrogatory No. 10(c), CT 186]:

“The mode of operation of said tread aligner was demonstrated insofar as possible without conducting an actual tire recapping operation.”

Prices for the displayed patented apparatus were quoted to visitors to the booth [Fike Depo.: p. 57]. In addition one of the patented apparatus was offered as a door prize at the convention [Ex. 5, CT 202].

**The Record as to Super Mold's Contention of  
Experimental Use Prior to the Critical Date.**

In the extensive contemporaneous documentation of record in this case, there is found not a single reference to, or suggestion of, an experimental program. The Sears purchase order, the Trutred Acknowledgment of Order, and the thirty-seven invoices are completely devoid of any reference to such a program. This record also contains five letters from Mr. Barron of Sears to Mr. Fike, each referring to the purchase of the 248 tread aligners [Ex. 9, CT 206; Ex. 10; CT 217-218; Ex. 11, CT 207; Ex. 12, CT 208-209; Ex. 13, CT 210]. These letters refer to Sears need for the bead aligners; they provide delivery information; and they inquire as to Trutred's production. There is no reference whatsoever to any testing program.

This record also contains two letters from Mr. Fike to Mr. Barron, each referring to the Sears purchase. In his letter of June 18, 1958 [Ex. 16, CT 213], Mr. Fike thanked Mr. Barron for the order and requested inventory information so that Trutred could proceed with the order. In his letter of December 15, 1958 [Ex. 18, CT 215], after deliveries under the order had been completed, Mr. Fike summarized the basis upon which Sears had been invoiced. Again, no reference was made to the existence or results of any testing program.

As evidence of the claimed experimental program, Super Mold relies on statements by Mr. Fike in his affidavit filed in the District Court action as assertedly showing his motivation at the time of the Sears pur-

chase. Illustratively, it quotes the following from the affidavit [CT 272]:

“The sale and use of my tread aligners to Sears was a good faith use for experimental purposes and not a public use.”

and concludes from this (Super Mold Brief, p. 29):

“Thus, the intent of the inventor Fike to conduct an experimental program was clearly established.”



## ARGUMENT.

### There Is No Genuine Issue of Material Fact.

Super Mold argues that an unresolved question of fact existed, precluding granting of the motion for summary judgment, because the inventor now states that his motivation was experimental testing and not a public use. There is no dispute that the inventor now makes this statement as to his motivation in 1958 and, presumably, would repeat this statement if a trial were held. However, it is equally true that the facts of record summarized in the foregoing Statement of the Case, established through Super Mold, are unchallenged by Super Mold. There is therefore no dispute as to any material evidentiary facts.

What was done by the District Court was to measure against the present statement of the inventor as to his past motivation, the other facts of record. In doing so, the District Court applied the criteria applicable to the resolution of the ultimate fact, namely, whether or not the prior sales and uses were experimental, on the basis set forth in *Cataphote Corp. v. De Soto Chemical Coatings, Inc.* (9th Cir. 1966), 356 F. 2d 24, at p. 26:

“The determination of whether appellant’s activities prior to the critical date were merely experimental or were of the kind set out in section 102(b) is a matter left for the consideration of the trier of fact. The resolution of this question depends principally upon a careful examination of each item of evidence and an evaluation thereof to judge the nature and purpose of the course of conduct of the purported patent holder. . . . The resolution of the sole issue raised regarding section 102(b) depends entirely on a determination, from

the totality of evidence presented by both parties, of the nature of the acts committed prior to the critical date and the purpose that motivated the commission of those acts. To the extent that issues can be accurately characterized as solely questions of law or fact, the crucial issue involved in this controversy is an issue of fact.”

With no need for proof beyond the record already made and no material evidentiary fact in dispute, summary judgment was the appropriate procedure. *Park-In Theatres v. Perkins* (9th Cir. 1951), 190 F. 2d 137, 142. The District Court then, from the totality of the evidence, correctly determined that the Trutred activities prior to the critical date were of the kind prohibited by 35 U.S.C. Sec. 102(b).

**The Totality of the Evidence Fully Shows That the Acts of Trutred Prior to the Critical Date Constituted Commercial Exploitation and Not Merely Experimentation.**

In its brief, Super Mold attacks the decision of the District Court on the basis “The District Court, however, ignored the inventor’s motivation as set forth in his affidavit and substituted therefor the District Court’s feeling as to what it assumed was the inventor’s motivation.” (Super Mold Brief, p. 29). Super Mold would have had the District Court, without consideration of all of the other items of evidence of record, determine the issue solely on the basis of the inventor’s present self-serving conclusion as to what his motivation was in 1958. To have followed such a course would have been contrary to the above-expressed criteria for resolution of this issue laid down by this Court



in the *Cataphote* case, *supra*. The District Court correctly considered the totality of the evidence in reaching its conclusion that to sustain the validity of the patent at issue in the light of the Trutred activities of record would result in a circumvention of both the terms and policy of 35 U.S.C. Sec. 102(b).

The record shows that Trutred, concerned because Sears had solicited in early 1958 bids from other companies for tire bead aligners, built prototypes of the patented apparatus in April and May 1958, and tested them at the Los Angeles retreading plant for Sears stores. At least one of these prototypes (Unit No. 2) was paid for by Sears. A comparable use of a prototype of itself was held to constitute an invalidating competitive activity under 35 U.S.C. Sec. 102(b) in *Koehring Company v. National Automatic Tool Company* (7th Cir. 1966), 362 F. 2d 100.

In the present case, the commercial exploitation went far beyond that in the *Koehring* case. The use of the patented apparatus at the Los Angeles retreading plant involved a period of about two months. In his affidavit, Mr. Fike stated as follows with respect to the work with the prototype at the Los Angeles plant [CT 271]:

“... Based upon the results of such preliminary testing, I believed that the basic inventive principle was correct and in June 1958 I informed Sears of this fact.”

Thereafter, Sears issued its purchase order for 248 of the patented apparatus at a cost in excess of \$40,000.

By this order, Sears outfitted its seven retreading plants located in Los Angeles, Chicago, Dallas, Akron,



Seattle, Camden, and Newark with the patented apparatus. Mr. Fike, in explaining this order, stated in his affidavit that “At this time I realized, however, that it would be necessary to conduct further research and development before my bead aligner could become a commercially useable product” and that he accepted the Sears order “In order to expedite the completion of such research and development work . . .” [CT 271].

The implausibility of the proposition that a company such as Sears would, following work with two prototypes at one of its plants, proceed to order 248 of the same apparatus at a cost of \$40,000 to equip all seven of its retreading plants scattered over the country if the ordered apparatus were not already “a commercially useable product” is apparent from its mere statement. In *National Biscuit Co. v. Crown Baking Co.* (1st Cir. 1939), 105 F. 2d 422, the Court was faced with the explanation that the delivery of patented machines was merely for experimental purposes, albeit that the magnitude of the transactions was far less than found in the present case. After noting (p. 424) that “A machine, however, may be commercially operable, although defects appear in the production, which is not due to fundamental defects and may be eliminated,” the Court said at page 424:

“ ‘ . . . To say that the Atlantic Cone Company urgently desired a second inoperative machine, or that it thought to make things meet with two uncommercial machines instead of one, is somewhat fantastic.’ ”

and, further, at page 425:

“While waiting for delivery of more machines, the Werlins themselves or the Atlantic Cone Com-

pany expended over \$8,000 on two new machines in substantial duplication of the 1920 McLaren machine. It is inconceivable that so large an expenditure was incurred by them or this company to produce commercially useless machines.”

A transaction of the magnitude of the Sears transaction, following as it did a period of testing of the same apparatus at one of its retreating plants, is irreconcilable with a claim today that it was part of some experimental program. Additional refutation of such a claim is furnished by the absence of any suggestion of such a program in the documents of record as to this transaction.

Even if, as Mr. Fike contended in his testimony, Trutred desired some additional testing of the patented apparatus after the testing of the prototypes at the Los Angeles plant, the activities of Trutred clearly demonstrate that such testing was subordinate to the commercial motivation of the sales. A bona fide experimental program would not have required that every Trutred mold at the seven Sears plants across the country be outfitted with the patented apparatus. It would have involved neither sales of this magnitude nor application of trade and quantity discounts to the list prices. It would have involved systematic reports as to operation, not merely a request that Sears personnel report any trouble to Mr. Fike [Answer to Interrogatory No. 1(f)(ii), CT 178]. The latter is nothing more than sound customer relationship. The patented apparatus was delivered to the various Sears plants without any restrictions by Trutred as to use or accessibility to the apparatus.



As to 35 U.S.C. Sec. 102(b), this Court, in the *Cataphote* case, *supra*, stated (356 F. 2d at p. 25):

“ . . . The express purpose of this statutory provision was to prevent the extension of the monopoly period permitted by the patent laws by requiring an inventor to make timely application so that the patent period might commence to run without undue delay. . . . ”

In the *Koehring* case, *supra*, the Court considered the limitations upon permissible bona fide experimental use in view of the policy consideration underlying 35 U.S.C. Sec. 102(b), stating (362 F. 2d at pp. 103-104) as follows:

“A reasonable period of experimentation wherein the inventor may perfect what he has conceived has long been acknowledged as an exception to the requirement of seasonable disclosure. But this exception must be recognized as such; it must be so limited as not to interfere with the effectuation of the policy underlying the general rule of early disclosure. An inventor may not be permitted to use a period of experimentation as a competitive tool. ‘The use [of an invention] ceases to be experimental when the motivation of the inventor is to exploit the invention and gain a competitive advantage over others.’ *Solo Cup Co. v. Paper Mach. Corp.*, 240 F.Supp. 126, 131, (E.D. Wis. 1965).”

The policy of the statute cannot be thwarted because at the back of the inventor’s mind he hoped by exploitation to gain more knowledge as to the extent of his success. *Acrovox Corporation v. Polymet Mfg. Corporation* (2nd Cir. 1933), 67 F. 2d 860, 862.



The facts of record in this case show a program of product introduction and sales promotion that is consistent only with a stage of product development well beyond the experimental. Mr. Fike's own statements, the contemporaneous documentation as to the transaction between Trutred and Sears, and the surrounding circumstances demonstrate an activity that is typical of "a trader's, and not an inventor's, experiment." *Cataphote Corp. v. De Soto Chemical Coatings, Inc.*, *supra* (356 F. 2d at p. 27). Such activity is that prohibited by the statute and invalidates the patent.

**The Modifications Made After the Sales of the Patented Apparatus Did Not Change the Commercial Character of Trutred's Activities.**

The changes made in the patented apparatus after the deliveries to the various Sears retreading plants were essentially in size and in the material of construction of the component parts. The patent application subsequently filed did not describe and claim these changes. It did describe and claim the apparatus as delivered to Sears, demonstrating that the changes made after delivery did not involve the substance of the patent.

The fact that some changes were required to improve the apparatus sold does not change the commercial character of the transaction with Sears. As said by the Court in *Smith & Griggs Mfg. Co. v. Sprague* (1887), 123 U.S. 249 at page 265:

"... That it was capable of improvement need not be denied, nor that, while it was in daily use, its owner and inventor watched it with the view of devising means to meet and overcome imperfections in its operation; but this much can be said in every such case. . . ."

As early as 1891, in *International Tooth Crown Co. v. Gaylord*, 140 U.S. 55, 62-63, it was held that the invalidating effect of a public use or sale by an inventor was not avoided by subsequent changes which were such as would occur to one having ordinary skill in the field to which the patent relates. The Court said (p. 62):

“ . . . There is a multitude of cases in this court to the effect that something more is required to support a patent than a slight advance over what had preceded it or mere superiority in workmanship or finish. . . . ”

In that case, the patent in suit described and claimed the change by which it was unsuccessfully sought to escape the statutory prohibition. In the present case, the failure of the patentee to describe and claim these changes of itself shows that these were not considered of patentable significance.

The rule laid down in *International Tooth Crown Co. v. Gaylord*, *supra*, has been consistently followed, a recent expression of it by the Ninth Circuit being in *Tool Research & Engineering Corp. v. Honcor Corp.* (9th Cir. 1966), 367 F. 2d 449. At page 454, after considering *Smith & Griggs Mfg. Co. v. Sprague*, *supra*, and concluding that not every improvement is sufficient to take prior invention out of the operation of 35 U.S.C. Sec. 102(b), this Court stated:

“ . . . In either case the invention should fall within 102(b) if the differences between the claimed thing and the sold or used thing are obvious to one skilled in the art. In either case unless the improvements would be patentable, the inventor has used or disclosed his invention contrary to the purpose of Section 102(b). ”



Where, as here, subsequent changes are not described and claimed in a patent but the apparatus as sold is described and claimed in such patent, the fact that changes were made becomes completely incidental to the application of 35 U.S.C. Sec. 102(b).

**Trutred's Advertisements and Trade Show Demonstrations of the Patented Apparatus Are of Themselves Invalidating Public Uses and "On Sales" Under 35 U.S.C. Sec. 102(b).**

As was described in the Statement of the Case, Trutred, prior to the critical date, advertised the patented apparatus in a trade magazine and exhibited, demonstrated, and quoted prices for the patented apparatus at a trade convention of the National Tire Dealers and Retreaders' Association (NTDRA). Trutred even offered the bead aligner of the patented apparatus as a door prize at the convention [Ex. 5; CT 202; Answer to Interrogatory No. 10(f), CT 185].

The foregoing activities, occurring as they did when deliveries under the Sears order were nearing completion, accentuate the scope of the program of commercial exploitation undertaken by Trutred prior to the critical date. Further, Trutred's acts at the NTDRA convention, of themselves, separate and distinct from the clearly commercial transactions with Sears, were invalidating public uses and on sales under 35 U.S.C. Sec. 102(b). A public use exists where the invention is used by, or exposed to, anyone other than the inventor or persons under an obligation of secrecy to the inventor. *Piet v. United States* (D.C.S.D. Calif. 1959), 176 F. Supp. 576, 584. This is what occurred at the Trutred exhibit booth. As stated in the often-



cited case of *Egbert v. Lippman* (1881), 104 U.S. 333 at page 336:

“ . . . (W)hether the use of an invention is public or private, does not depend necessarily upon the number of persons to whom its use is known. If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation or restriction, or injunction of secrecy, and it is so used, such use is public, within the meaning of the statute, even though the use and knowledge of the use may be confined to one person.”

The exhibition and demonstration of the patented apparatus at the convention were public uses within 35 U.S.C. Sec. 102(b).

Coupled with the exhibition and demonstration of the patented apparatus, the quotation of prices to prospective purchasers at the NTDRA convention separately placed the patented apparatus “on sale” under the statute. A completed sale, whether with or without delivery, is not demanded. *Tucker Aluminum Products, Inc. v. Grossman* (9th Cir. 1963), 312 F. 2d 293, 295; *Wende v. Horine* (7th Cir. 1915), 225 Fed. 501, 505; *Philco Corporation v. Admiral Corporation* (D.C. Del. 1961), 199 F. Supp. 797, 815. In *Akron Brass Company v. Elkhart Brass Manufacturing Co.* (7th Cir. 1965), 353 F. 2d 704, 709, the Court held that the following items, occurring prior to the critical date, of themselves provided the requisite clear and convincing evidence that the patented device, a nozzle, had been on sale within the meaning of Section 102(b):

(a) Demonstrations of the nozzle by the patentee's vice president in charge of sales, and possession of a nozzle by a dealer; and

(b) A brochure showing a picture of the nozzle and a price list, these being treated by the Court as the "most persuasive evidence."

The evidence as to the activities by Trutred at the NTDR convention is fully persuasive that Trutred separately placed the patented apparatus on sale at that location.

### **The "Section 102(b)-Section 112 Dilemma" of Super Mold's Creation Has No Support in Law or Fact.**

Although Super Mold now ingenuously professes that the inventor was placed between the "Scylla of 35 U.S.C. 102(b) and the Charybdis of 35 U.S.C. 112," the course between these mythical perils had been clearly charted by the statutory and decisional law long prior to 1958. Since the first Patent Act in 1790, the legislature and the courts have protected the public by requiring an inventor desiring to obtain the advantage of the patent monopoly to file his patent application as diligently as possible. Section 102(b) of the 1952 Patent Act (35 U.S.C.) is based on a history of legislation premised on this requirement. By requiring that the patent application be on file within one year of public use or on sale in this country, the section embodies the condition that the inventor act with speed in filing an application or his rights to a legal private monopoly will be barred. The rationale for the requirement that the inventor act with speed in filing the application was set forth in *Pennock and Sellers v.*



*Dialogue* (1829), 27 U.S. 1, 19, wherein Mr. Justice Story stated:

“ . . . (T)here is much reason for the limitation thus imposed by the Act. . . . If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should for a long period of years retain the monopoly, and make, and sell his invention publicly, and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure; and then, and then only, when the danger of competition should force him to secure the exclusive right, and he should be allowed to take out a patent, and thus exclude the public from any farther use than what should be derived under it during his fourteen years; it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries.”

An inventor may not enjoy the best of two possible worlds and must content himself with secrecy or legal monopoly. *Koehring Company v. National Automatic Tool Company, supra* (362 F. 2d at p. 104). Where he selects the world of legal monopoly, the duty to the public of timely disclosure in compliance with the conditions imposed by law overrides whatever personal burden may be contended to be thereby imposed upon the inventor.

As to the requirements of 35 U.S.C. Sec. 112, so long as the patent discloses all of the essential functions of the commercial machine, it is not necessary that it disclose all the refinements of the production model. *Honolulu Oil Corporation v. Shelby Poultry*



*Company* (4th Cir. 1961), 293 F. 2d 127, 129. Mr. Fike was, in June 1958, in a position to meet these requirements. Nevertheless, he chose to ignore 35 U.S.C. Sec. 102(b).

That the "Section 102(b)-Section 112 dilemma" is an "afterthought" creation is shown by the illusory character of the reasons advanced by Super Mold in explanation of its asserted existence. This is demonstrable from Super Mold's own contention that the "experimental program" ended in January 1959. This was five months earlier than the first year anniversary (May 1959) of the prototype sale and six months earlier than the first year anniversary (June 1959) of the Sears sale, so that the requirements of timely filing under 35 U.S.C. Sec. 102(b) could still easily have been met. Yet, the application was not filed until October 29, 1959.

### **The Cases Cited by Super Mold Demonstrate the Gross Difference Between Bona Fide Experimentation and Trutred's Activities.**

The factual situations in the three cases as to experimental use cited in the Super Mold brief (pp. 23-25) provide a compelling comparison between bona fide experimentation and the commercial activities of Trutred. As to *Universal Marion Corp. v. Warner and Swasey Co.* (10th Cir. 1965), 354 F. 2d 541, the facts upon which the District Court found good faith use for experimental purposes, which finding was affirmed by the Circuit Court (354 F. 2d at p. 545), are more fully set out in the District Court's opinion (237 F. Supp. 719, 723-725).

In the *Universal* case, a single prototype earth-working machine was used before the critical date by the pat-

entees themselves on two construction jobs. In the first use, the machine was used for a total of two and one-half hours, and the Court pointed out that “. . . given the short duration of use, it clearly was not used for profit.” (237 F. Supp. at p. 725). The second use was longer, but the Court pointed out that it was used together with over thirty other pieces of construction equipment so that “. . . it is most unlikely that the machine was intended to do the bulk of the work.” Recognizing that the statute, 35 U.S.C. Sec. 102(b), was intended to prevent the inventor from extending the number of assured profit years beyond that provided by the statute (p. 724), the Court, as to the second use, pointed out “Nor is there any evidence that the use of the machine was a factor bargained for in letting the contract to the Ferwerdas.” (p. 725).

*Merrill v. Builders Ornamental Iron Co.* (10th Cir. 1952), 197 F. 2d 16, 19-20, involved, as to public use, a single machine located at the rear of the patentee's shop. Although in some instances charges were made for use of the machine (usually at about one-third of the regular rate), the patentee obtained the customer's permission “to try out the experimental model on the job in order to test it.”

In *Elizabeth v. Am. Nich. Pavement Co.* (1878), 97 U.S. 126, the inventor, at his own expense, placed a specimen of his pavement in a roadway to test the pavement in the only way it could be tested, namely, by allowing traffic over it for a period of time. However, in finding this use experimental, the Court carefully pointed out the particular circumstances which justified this conclusion, stating at page 136:

“Had the city of Boston, or other parties, used the invention, by laying down the pavement in other



streets and places, with Nicholson's consent and allowance, then, indeed, the invention itself would have been in public use, within the meaning of the law; but this was not the case. Nicholson did not sell it, nor allow others to use it or sell it. He did not let it go beyond his control. He did nothing that indicated any intent to do so. He kept it under his own eyes, and never for a moment abandoned the intent to obtain a patent for it."

In each of the above-discussed cases, no sale at all was made by the inventor. The inventor in each case retained direct control over the patented invention, and any financial return to him was incidental to the use for test purposes that was made. Single machines were involved in the uses made in the *Universal Marion Corp.* and the *Merrill* cases, and 75 feet of pavement was involved in the use made in the *Elizabeth* case. The exception to 35 U.S.C. Sec. 102(b) for bona fide experimental use that was found in these cases was under factual situations totally different from that shown to have existed in this case. To apply the rationale of these cases to the present factual situation would render 35 U.S.C. Sec. 102(b) meaningless.

**This Case Is an Exceptional Case Which Justifies Award of Reasonable Attorneys' Fees to Defendant.**

In making this appeal from the failure of the District Court to award attorneys' fees, Clapp's Equipment fully recognizes that the courts have applied the literal meaning of "exceptional" to cases in which attorneys' fees are sought under 35 U.S.C. Sec. 285, and that the award of such fees is an exercise of discretion. How-



ever, the equitable considerations that are here involved make it grossly unjust for Clapp's Equipment to bear the burden of counsel fees in the District Court and on this appeal.

In the District Court's letter of December 15, 1966 to counsel for both parties giving its decision following the hearing on the Motion for Summary Judgment, the Court, as to the issue of attorneys' fees, stated [CT 343]:

"On the question of attorney's fees, the invalidity of the patent based on the commercial activity antedating the application, seems so clear that prosecuting the instant action comes very close indeed to being bad faith on the part of plaintiff justifying the award of such attorney's fees. However, I have found no authority in this circuit for the awarding of attorney's fees where summary judgment has been granted. I have therefore determined to award no attorney's fees in this case. . . ."

Although no case decided by the Ninth Circuit in which the point has been specifically considered has been found, it is submitted that *Park-In Theatres v. Perkins*, *supra*, supports the propriety of the award where summary judgment has been granted, provided there are present the equitable considerations justifying the award. In that case, the District Court had held the patent claims invalid on defendant's motion for summary judgment and awarded attorneys' fees. This Court affirmed the judgment as to invalidity but set aside the award of attorneys' fees. The setting aside of the award was not because it had been made in conjunction with the grant of summary judgment, but was

because “. . . the district court did not impose a sufficiently strict standard in finding cause adequate to justify an allowance of attorney’s fees. . . .” (190 F. 2d at p. 143). In acting on the merits as to the award, *i.e.*, the adequacy of the findings, the Ninth Circuit approved, *sub silentio*, it is submitted, the propriety of the award on granting of summary judgment.

In *Park-In Theatres*, this Court also enunciated (at p. 142), the principles which should guide and control such an allowance as follows:

“‘. . . The provision is also made general so as to enable the court to prevent a gross injustice to an alleged infringer.’ 1946 U.S. Code Congressional Service 1386, 1387. Thus, the payment of attorney’s fees for the victor is not to be regarded as a penalty for failure to win a patent infringement suit. The exercise of discretion in favor of such an allowance should be bottomed upon a finding of unfairness or bad faith in the conduct of the losing party, or some other equitable consideration of similar force, which makes it grossly unjust that the winner of the particular law suit be left to bear the burden of his own counsel fees which prevailing litigants normally bear. . . .”

These same guiding and controlling principles were set forth in *Shingle Product Patents v. Gleason* (9th Cir. 1954), 211 F. 2d 437.

In the present case, there is no question that all of the facts before this Court were known to Super Mold before this action was instituted. Super Mold itself adduced them through the testimony of Mr. Fike taken in Interference No. 92,625 in order to show priority of



invention by Mr. Fike over the subject matter of an application owned by one Clement O. Dennis. Dennis then conceded priority but, significantly, Dennis, although in the position of a losing party, and a competitor in the tire retreading equipment business, was granted by Super Mold a *free*, nonexclusive, *irrevocable* license [Ex. K, CT 299-301] under the patent at issue.

After Super Mold gave Clapp's Equipment notice of infringement, counsel for Clapp's Equipment, prior to filing of the complaint in this action, presented the facts which are before this Court in a letter to Super Mold's counsel [Ex. G, CT 258].

Viewed with rigorous objectivity, the facts of record in this case unequivocally show a course of conduct prior to the critical date that is so violative of long-established statutory and decisional patent law as to leave no room for doubt as to the invalidity of this patent. The authorities cited herein show that even single aspects of Trutred's activities—such as the sale of the prototype, or its advertising coupled with the exhibition, demonstration, and price quotation as to the patented apparatus at a trade convention, would each separately raise grave doubts as to the validity of the patent. Taken in conjunction with the principal sale to Sears, the conclusion of invalidity is inexorably clear.

The Court is asked to measure the facts of record against the mandate laid down in *Smith v. Griggs Mfg. Co. v. Sprague*, *supra* (123 U.S. at p. 264), as to plaintiff's burden once it is shown that prior public uses and sales of the patented invention have occurred. Such proof should be "full, unequivocal and convincing." Super Mold's proof falls so short of meeting this burden that it would be grossly unjust for Clapp's Equipment to be left to bear the burden of its own



counsel fees. It is submitted that this case presents the type of equitable consideration to which this Court had reference in *Park-In Theatres v. Perkins*, *supra*, (190 F. 2d at p. 142), and that Clapp's Equipment should be awarded its attorneys' fees for the District Court action and this appeal. See *Tidewater Patent Development v. Kitchen* (4th Cir. 1967), 371 F. 2d 1004, 1013.

### Conclusion.

The totality of the facts in this record fully attest to the correctness of the decision of the District Court in concluding that the activities by Trutred prior to October 29, 1958 invalidated the patent at issue under 35 U.S.C. Sec. 102(b). The judgment of the District Court as to the invalidity of the patent should be affirmed.

Moreover, this totality provides such unequivocal and convincing proof of invalidating acts that the institution of litigation under these circumstances amounts to nothing more than the exercise of a naked right. To sue under these facts was an abuse of that right and saddled Clapp's Equipment with an unjust hardship. Since it would be unjust that Clapp's Equipment be left to bear the burden of its own counsel fees in the District Court and on this appeal, it is submitted that this Court should exercise its discretion in favor of the allowance of such fees.

Respectfully submitted,

CHRISTIE, PARKER & HALE,  
ANDREW J. BELANSKY,  
JOHN F. POWELL,  
*Attorneys for Appellee Clapp's  
Equipment Division.*



### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ANDREW J. BELANSKY





## APPENDIX A.









## APPENDIX B.





CUSTOMER: Sears, Roebuck and Co.  
925 South Homan Ave.  
Chicago 7, Ill.

TIRE MOLDS INC.  
1623 NADEAU  
LOS ANGELES, CALIFORNIA  
LU. 8-5228 LU. 8-5229

DATE August 5 1958  
SHIP VIA As advised  
TERMS Net - 10th. Prox.  
ORDERED BY H. A. Parton  
TAXABLE ☐ RESALE ☐ INTERSTATE ☒  
SALESMAN L. T. Fike

SHIP TO: Destinations will be advised

INVOICE TO: Sears, Roebuck and Co. as above

ITEM	QUANTITY	DESCRIPTION	PRICE	AMOUNT
1	248	Trutred Trumatic head aligners	\$225.00	
		Less 20%	45.00	
			180.00	
		Less 10% Quantity discount	18.00	
		Price each -	162.00	\$40,176.00
<p>SHIPPIN G SCHEDULE Starting 8-11-58, eight units per day, progressing to twenty per day until completion of order.</p> <p>8/19. 10 TO ANDERSON, L.A. - THEIR P.O. (20) INV. 909</p> <p><i>Completed 8/19</i></p>				

DELIVERY SCHEDULE

ITEM NO.	1	2	3	4	5	6	7	8	9	10
REQUESTED	Each									
WILL SHIP	See above shipping schedule									

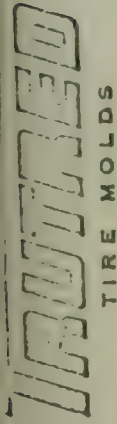
FILE





## APPENDIX C.





1623 NADEAU STREET  
LOS ANGELES 1, CALIFORNIA  
LUDLOW 8-3338  
LUDLOW 8-0058

SOLD TO Sears Roebuck & Company  
925 South Main Ave  
Chicago 7, Illinois

August 22, 1953

TERMS: Net 10th Prox.

INVOICE NO. 00222  
ORDER NO. \_\_\_\_\_  
YOUR ORDER 2-552771  
SHIPPED 8-22-53  
VIA Universal Carloading  
F.O.B. Incubated

SM 2-54 J2270

14

Trutrod Tru-Matic Road Aligners

0 3225.00

\$ 3,150.00

Less 20% Discount

645.00

2,500.00

Less 10% Special Quantity Discount

250.00

\$ 2,250.00

No tax - out of state

Shipped 8-22-53 by Universal Carloading to Anderson Tires, Inc.  
2950 South Indiana  
Chicago 16, Illinois

Bill of lading sent to destination.

*8-12*





## APPENDIX D.





**Gas Stations Average \$77.10 On TBA**  
Cash registers in auto service stations withing up a record \$1.4 billion worth of "TBA" business this year the United States Rubber Co. reports.

"Ten years ago service station TBA business amounted to \$630 million, less than half of what it is today," said G. Raymond Cuthbertson, U.S. Rubber vice president and general manager of its tire division.

"Service stations today sell one-third of all the replacement passenger tires sold in this country, 36 per cent of all replacement batteries for passenger cars and 68 per cent of all the anti-freeze bought by American motorists," he revealed.

"Service stations are the largest single retail outlet for TBA items and promise to become an even more important factor with the continued growth of suburban areas and as more and more oil companies put complete TBA sales programs into effect at their stations," Mr. Cuthbertson declared.

Total TBA sales by all outlets are expected to amount to \$4.3 billion this year.

A gasoline sales outlet is classified as a service station if it does more than one-half of its total business in petroleum products. There are 183,000 service stations in this country. All of them sell some TBA products.

This year the average service station will sell 200,000 gallons of gasoline, 2,800 hours of lubrication and servicing, and \$7,715 worth of TBA products. The average service station will do most of this business with 212 regular customers.

According to a yardstick used by the industry, a service station will sell \$18.47 worth of new tires, retreads and tubes for every 1,000 gallons of gasoline sold.

The next biggest item is batteries, which add \$6.02 to the service station bill every time he sells 1,000 gallons of gas. Then come anti-freeze, \$4.17 per 1,000 gallons of gas, spark plugs, \$3.85; oil filters, \$2.29; fan belts, 68 cents; wiper blades, 65 cents, and on down the list to the smallest item—fuses, 4 cents.

### Battery Men Meet October 30

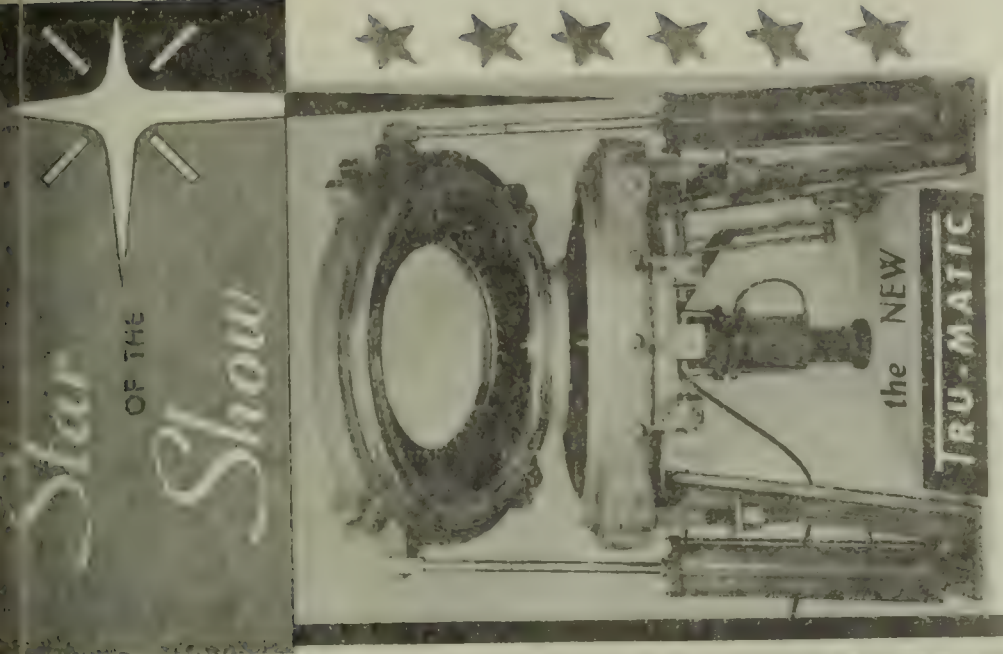
More than 500 executives from over 200 battery manufacturers and marketers will attend the Fall Meeting of the Association of American Battery Manufacturers on October 30, 31 and November 1 at the Palmer House, Chicago. The Association's President, D. Nevin Smith, Vice President of The Electric Storage Battery Company, will preside.

The program will cover all phases of the storage battery business: manufacturing, distribution and selling.

### August Rubber Consumption Up

Consumption of new rubber in the United States for the month of August amounted to 109,859 long tons, as compared with the 98,100 long tons consumed during July.

**Tire, Battery & Accessory News, October, 1958**



## PASSENGER MOLD

Built-in Bead Aligner and Tire Ejector

Never a Crooked Tread

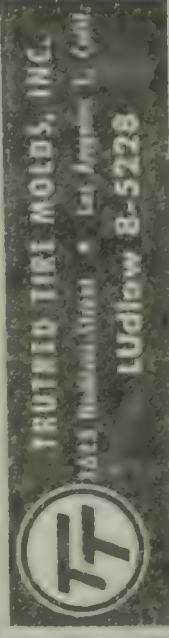
Fast — Velvet Smooth — Efficient

## CHECK THESE FEATURES:

- Tire does not contact matrix until mold is closed and air pressure is applied
- Tire is automatically ejected from matrix after the cure. No extractions, hooks needed
- Fast, even heat. Large flange chambers
- Four inch cylinders attached to extra-heavy reinforced legs
- Sliding hinge pins for quick changing of matrices
- Unconditional One-Year Guarantee against defective material and workmanship

**BUILT TO ACCOMMODATE TRUTRED, American and Ace type Matrices**

For More Information — WRITE, WIRE or PHONE:











No. 21752  
No. 21752A

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IN THE  
**United States Court of Appeals  
for the Ninth Circuit**

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SUPER MOLD CORPORATION,

*Appellant,*

vs.

CLAPP'S EQUIPMENT DIVISION, INC.,

*Appellee.*

---

CLAPP'S EQUIPMENT DIVISION, INC.,

*Appellant,*

vs.

SUPER MOLD CORPORATION,

*Appellee.*

---

**PLAINTIFF-APPELLANT'S REPLY BRIEF**

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NOV 15 1967

B. LUCK, CLERK





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*Appellee.*

---

**PLAINTIFF-APPELLANT'S REPLY BRIEF**

---

**DEFENDANT-APPELLEE'S STATEMENT  
OF THE CASE**

The facts set forth by the defendant in its Statement of the Case generally correspond to those recited in Plaintiff-Appellant's Opening Brief. Plaintiff wishes to point out, however, one important discrepancy, namely the first paragraph on Page 15 of Defendant's Brief states that there is found not a

single documentary reference directed to an experimental program in connection with the Sears' sale. This statement is clearly incorrect since it completely ignores the detailed report sent by the inventor Fike to Sears November 5, 1958 (Record 214 and Appendix A to Plaintiff-Appellant's Opening Brief). This report sets forth three causes of breakdowns in the experimental Bead Aligners and points out how such defects could be corrected.

Reference to this report will indicate clearly that the Sears' Bead Aligners were breaking down in use. Thus, the report refers first to the shafts blowing out of the aligner. This shaft is designated 124 in Fig. 4 of the patent drawings appearing at Page 35 of Plaintiff-Appellant's Opening Brief. The report next refers to breaking of the bottom aligner wheel, designated 120 in Fig. 4 of the patent drawings. Finally, the report refers to bending of the aforementioned shaft. An examination of the patent drawings will make it clear that in the event of any of these three contingencies the Bead Aligner would become completely inoperative whereby the tire retreading mold upon which it was mounted would necessarily be removed from service-exactly as stated by the inventor Fike (Fike Depo. 29).

## THE FALLACIES OF DEFENDANT'S ARGUMENT

**Re Defendant's Argument There Is No Genuine Issue Of Material Fact.**

This issue was fully explored in Plaintiff-Appellant's Opening Brief at Pages 28 through 31 and requires no amplification herein.



Re Defendant's Contention That The Totality Of The Evidence Fully Shows That The Acts Of Trutred Prior To The Critical Date Constituted Commercial Exploitation And Not Merely Experimentation.

The only argument appearing under this heading which requires discussion is set forth at Page 20 where defendant contends that it would have been implausible for Sears to gamble \$40,000.00 on the Bead Aligner if the latter were not already commercially usable. At first blush defendant's argument appears sound, but when the uncontested facts are examined the soundness of this argument fades. Thus, it should be noted that the arrangement between Trutred and Sears concerning the Bead Aligner was not a conventional commercial transaction. *Sears did not purchase an off-the-shelf machine when it purchased the Bead Aligners.* Instead, the Bead Aligners ordered by Sears were hand-built and not constructed on a production basis (Record 271) (Fike Depo. 31). Moreover, these Bead Aligners were constructed in the Trutred shop one at a time rather than being constructed by the assembly line method, and no jigs and fixtures were utilized as in the case of other Trutred products (Fike Depo. 32).

Next, it should be noted that Trutred and Sears were not in the position of an ordinary buyer and seller with respect to the purchase of the Bead Aligners. In this regard, the retreading plants wherein the Bead Aligners were installed and tested were not owned or operated by Sears (Fike Depo. 14, 15). Instead, these plants were owned by operated by

several individuals including Jack Koplin, Paul Klein, Milton Goldberg and Barney Tolansky (Fike Depo. 16, 17). Sears, however, owned the retreading equipment in these plants. As a plant operator the aforementioned Jack Koplin authorized the Sears' order after Fike told him Fike believed he was "on the right track to curing the problem" (Fike Depo. 31). Koplin was aware that the delivery of the Bead Aligners was in connection with an experimental problem (Fike Depo. 51). Both Sears and Trutred were jointly interested in solving the industry-wide problem of crooked tire treads (Record 270) (Fike Depo. 12 and 13). In fact, Sears had invited others in the trade to solve this problem in early 1958 (Fike Depo. 23). Accordingly, it will be clear that *Sears in purchasing the Bead Aligners from Trutred was attempting to solve this serious problem and was not merely purchasing a machine used in day-to-day tire rebuilding.* The fact that the relationship between Trutred and Sears was not that of the ordinary buyer and seller is further evidenced by the aforementioned Fike report to Sears of November 5, 1958. This report details three serious operational failures encountered in the Bead Aligners. *This Court can take judicial notice that such reports are not furnished to the purchaser of a commercially-proven machine.*

It will therefore be apparent that the uncontested facts indicate it would be quite reasonable to assume that Sears was in fact willing to gamble \$40,000.00 to solve the long-standing industry-wide problem of crooked treads.

It is of course unfortunate that further evidence



regarding Sears' willingness to gamble could not be brought before this Court. This paucity of evidence resulted from the refusal of the District Court to go forward with the separate trial on the public use issue previously ordered by the District Court, despite the plea of plaintiff's attorney at the Summary Judgment hearing for a full scale trial to permit the production of witnesses (Transcript 20). Direct evidence as to whether or not Sears was willing to make the gamble could only be adduced by means of a trial. In this regard, this Court will appreciate the difficulty of trying to obtain affidavits for use at a Summary Judgment hearing from persons not a party to a lawsuit.

**Re Defendant's Contention That The Modifications Made After The Sales Of The Patented Apparatus Did Not Change The Commercial Character Of Trutred's Activities.**

Commencing with Page 23 defendant argues that the changes made in the Bead Aligners after the beginning of the experimental program were merely improvements and did not amount to patentable advances. This ground of argument must fail because the fact upon which it is premised is incorrect. The changes made to the Sears' Bead Aligners as a result of the testing thereof were not mere improvements, but instead were necessary in order to prevent such Bead Aligners from breaking down (Fike Depo. 46). Thus, it will be clear that this case differs from the authorities cited by defendant in that Fike was not merely



trying to improve a commercially usable apparatus, but instead was making the necessary modifications to an unperfected apparatus to perfect it to the point where it could remain in day-to-day operation. The fact the modifications were not patentable is immaterial so long as such modifications were part of the bona fide experimental program.

**Re Defendant's Argument That Trutred's Advertisements And Trade Show Demonstrations Of The Patented Apparatus Are Themselves Invalidating Public Uses And "On Sales" Under 35 U.S.C. Sec. 102(b).**

At Page 25 defendant argues that the mere fact Trutred advertised the Bead Aligner, displayed the two dummy Bead Aligners at the October 1958 NTDR trade show and offered a Bead Aligner as a door prize at such show resulted in an invalidating public use. This argument is completely fallacious. This question was decided by the Supreme Court in the early case of *Elizabeth v. Pavement Co.*, 97 U. S. 126 referred to at Page 24 of Plaintiff-Appellant's Opening Brief. In the *Elizabeth* case the length of pavement embodying the invention was publicly used and in clear public sight for six years before a patent application was filed. As noted in Plaintiff-Appellant's Opening Brief the Supreme Court stated that although this use was open to the public it was not a public use within the meaning of the statute so long as the inventor was testing and developing the invention. To the same effect are the *Universal Marion* and the *Merrill* cases referred to in Plaintiff-Appellant's Open-

ing Brief at Page 23. The *Piet v. United States* case relied upon by defendant is inapposite because the patentee in that case *did not even contend there was an experimental use*. The same is true with respect to the *Egbert* case next cited by defendant.

At Page 26 defendant contends that the activities of Trutred at the NTDRA Convention separately placed the patented apparatus "on sale" under the provisions of 35 U.S.C. 102(b). This argument is not only untenable, since as noted hereinabove the authorities are all in agreement that during the period of an experimental program a devise does not fall within the "on sale" provision of 35 U.S.C. 102(b). The several cases cited by the defendant on Page 26 are not in point since none of these cases involved an experimental program. This Court's attention is particularly directed to the *Akron Brass* case cited by the defendant wherein it was held that there could not be a placing "on sale" until

"after the experimental stage has passed, the invention reduced to practice, and the apparatus manufactured in its perfected form." Citing *Julian v. Drying Systems Co.*, 346 F. 2d 336.

Accordingly, on the basis of the authority of the *Akron Brass* case the Bead Aligners could not be held "on sale" during the Sears' experimental program. Thus, if this Court agrees with plaintiff that at the time of the NTDRA Convention the Bead Aligners were still the subject of an experimental program, the "on sale" provision of 35 U.S.C. 102(b) could not possibly apply.



**Re Defendant's Contention That The Section 102(b) — Section 112 Dilemma Of Super Mold's Creation Has No Support In Law Or Fact.**

This argument of defendant is worthy of little comment except to note that in both the *Pennock and Sellers v. Dialogue* and the *Koehring Company v. National Automatic* cases the Court found that the devices operated to the satisfaction of the inventor long prior to the critical filing date. The inventor therefor had developed the *best mode* of his invention long prior to the critical filing date and had no reason to conduct further development.

**Re Defendant's Contention That The Cases Cited By Super Mold Demonstrate The Gross Difference Between Bona Fide Experimentation And Trutred Activities.**

Commencing at Page 29 defendant complains that the three cases cited by Super Mold in its Opening Brief differ from the factual situations in the present case because in these three cases only a single machine or use was involved. As set forth in Plaintiff-Appellant's Opening Brief this is exactly the point which led the District Court to erroneously hold a public use in this case. Thus, as set forth commencing at Page 27 of Plaintiff-Appellant's Opening Brief the District Court failed to appreciate that whether one machine or 248 machines were involved in the Sears' experimental program was immaterial so long as the use of such machines involved a good faith experimental use. This is particularly true where but a single sale to a single customer of a single design is involved.



Although many Bead Aligners were placed in use, each of the modifications were made in each of the devices. To arbitrarily limit the number of machines an inventor might employ in an experimental program could readily extend the time necessary to complete the experimental program and thereby delay the introduction of the new technology involved to the buying public.

A fact situation similar to that in the present case existed in *Progressive Engineering, Inc. v. Machinecraft, Inc.*, 169 F. Supp. 291 (D. Mass. 1959) affd. 273 F.2d 593 (1st Cir. 1959). In the *Progressive Engineering* case the patent in suit related to a top roll for a textile weaving mechanism and the patentee sold 12 rolls to one customer and 400 rolls to another customer before the critical date. The Court found, however, that since these sales were part of an experimental program, the sales neither individually nor collectively constituted a public use invalidating the patent.

In *Great Lakes Carbon Corp. v. Continental Oil Company*, 219 F. Supp. 468, affirmed at 345 F. 2d 175 (5th Cir. 1965), the experimental program involved a purchase order for 17,000 tons of coke, yet the Court held that since the sale involved experiments and the "experiments resulted in changes which made practical commercial operations possible," no public use was involved.

Another recent case involving the sale of a number of machines is *Ushakoff v. United States*, 328 F. 2d 669 (Court of Claims 1964). In the *Ushakoff* case

the patentee sold 36 solar stills to the government over one year before the patent filing date. The Court held, however, that since these stills were tested and modified after delivery to render them practical the sale did not constitute a public use invalidating the patent.

The common thread running through the above-mentioned *Progressive Engineering*, *Great Lakes Carbon* and *Ushakoff* decisions is the conduct of a good faith experimental program to develop a commercially impractical device into a commercially usable device. This same thread runs through the *Universal Marion*, *Merrill* and *Elizabeth* cases. None of these cases placed any limit on the number of devices employed in an experimental program.

Applying the law of the above cases to the uncontroverted facts in the present case, it will be seen that the inventor Fike utilized the Sears' sale to develop his Bead Aligner from a device that frequently broke down into a commercially usable tool and accordingly the Sears transaction was a bona fide experimental use program. The District Court therefor erred in this case when it concluded:

“the admitted sale of 248 machines prior to the critical date precludes any defense based on experimentation” (Record 343).

**Re Defendant's Contention That This Case Is An Exceptional Case, Which Justifies Award Of Reasonable Attorneys' Fees To Defendant.**

Commencing at Page 31, defendant seeks to persuade this Court that the District Court erred in re-



fusing defendant its attorneys' fees. Plaintiff is hopeful that the question of attorneys' fees will be rendered moot by the virtue of this Court's reversal of the District Court's judgment.

The *Park-In Theatres v. Perkins* decision referred to by defendant in its brief sets forth the basis for granting a prevailing litigant in a patent suit its attorneys' fees, this case holding such an allowance should be bottomed upon a finding of unfairness or bad faith in the conduct of the losing party.

As noted in defendant's brief the District Court found as a matter of fact the plaintiff did not act in bad faith so as to justify the award of such attorneys' fees. Plaintiff contends that on the contrary it has always acted in complete good faith. Thus, it was plaintiff who made public all of the details of the Sears program by submitting the documentary evidence thereof to the Patent Office during the prosecution of the patent in suit. Once the patent in suit was issued and defendant was found to infringe, plaintiff prior to filing this action conferred with its patent counsel regarding the merits of plaintiff's case and particularly the public use versus experimental use program (Record 273, 284). As a result of plaintiff's review of the circumstances of the Sears transaction with its patent counsel, the present action was filed.

The facts in this case are similar to those in *Florida Brace Corp. v. Bartels* decided by this Court in May 1964 and reported at 332 F.2d 337. In the *Florida Brace* case, the patent was held invalid and the District Court awarded defendants their attorneys' fees.



The plaintiffs brought the action relying upon the advice of their patent counsel. This Court reversed the award of attorneys' fees holding:

“Appellants thought that they had a good patent. They were proved wrong, but such proof does not establish a lack of good faith.”

Since the plaintiff in the present case has always acted in good faith, there is no basis whatever for awarding defendant its attorneys' fees.

## CONCLUSION

The uncontroverted facts in this case establish that the inventor Fike was faced with an industry-wide problem of crooked tire treads. To solve this problem he conceived his Bead Aligner and built and tested two prototypes thereof. These prototypes broke down when placed in commercial operation, but Fike believed he could perfect his design to the point of commercial usability by further testing and development. Sears was vitally interested in Fike's project and ordered 248 of his Bead Aligners thereby providing him an opportunity to conduct a “crash” development program under various working conditions throughout the country.

The Bead Aligners were hand-built one at a time and installed and tested. As Fike had anticipated, these Bead Aligners broke down in operation. Fike was immediately informed of such breakdowns and he corrected his design as necessary to prevent reoccurrences. Each design change was made to each of the 248 Bead Aligners. The development program

continued until the causes of breakdowns were all eliminated.

This program was a good faith experimental use and it was error for the District Court to hold such program was a public use merely because of the number of machines involved in the development program.

The District Court erred in any event by granting a Motion For Summary Judgment when the fact of the inventor's motivation in conducting the Sears' program was unresolved. By its action the District Court destroyed plaintiff's valuable property right in its patent without giving plaintiff its day in court.

The Judgment of the District Court should be reversed.

Respectfully submitted,

FULWIDER, PATTON, RIEBER,  
LEE & UTECHT

By Francis A. Utecht

*Attorneys for Plaintiff-Appellant  
Super Mold Corporation*

### CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

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*Francis A. Utecht*





No. 21752

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IN THE

AUG 5 1963

United States Court of Appeals  
for the Ninth Circuit

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SUPER MOLD CORPORATION,

*Appellant,*

vs.

CLAPP'S EQUIPMENT DIVISION, INC.,

*Appellee.*

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PETITION FOR REHEARING AND  
SUGGESTION OF REHEARING IN BANC  
FILED BY PETITIONER  
SUPER MOLD CORPORATION

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LONG BEACH REPORTER

FILED

JUL 24 1963

WILLIAM B. LUCK, CLERK



## SUGGESTION FOR REHEARING IN BANC

Pursuant to Rule 35 (b), Federal Rules of Appellate Procedure petitioner suggests the appropriateness of rehearing this matter in banc. Such appropriateness is necessary to maintain uniformity of this decision with the decision of this Court in *Neff Instrument Corp. v. Cohu Electronics, Inc.*, 269 F.2d 668. In *Neff* this Court held that on appeal from order granting defendant's motion for summary judgment, this Court must give the plaintiff the benefit of every doubt. It will be apparent from the accompanying Petition For Rehearing that this Court did not give plaintiff the benefit of the doubt in this case.

Additionally, this proceeding involves a question of exceptional importance namely, whether or not improvements made to a device during an experimental program must themselves be patentable in order to establish an experimental use. No statutory nor decisional law could be found justifying this concept. It would be extremely unfortunate if this unsound doctrine became law as a result of this decision.





## PLAINTIFF-APPELLANT'S PETITION FOR REHEARING

It is the opinion of petitioner Super Mold Corporation that this Court in rendering its decision of July 11, 1968 overlooked certain critical facts and misapprehended not only the patent law but also the law governing the propriety of granting a Motion for Summary Judgment.

With respect to the errors of fact, the Court found a public use despite the inventor's affidavit that his intention in conducting the Sears' program was to carry out a crash experimental program, the Court specifically holding "Fike's testimony concerning his subjective intent has no probative force when weighed against the *overwhelming objective evidence* to the contrary". Such *overwhelming* evidence consisted of the following:

1. The inventor's deposition testimony appearing at the lower portion of Page 3 of the printed decision.
2. The shipping of the 248 aligners and the payment therefor prior to the critical date.
3. The advertising and display of the aligners prior to the critical date.
4. Quotation of the price of the aligner and the offering of one aligner as a door prize prior to the critical date.
5. The failure to mention or suggest an experimental program in the correspondence between Sears and Super Mold.

Referring to the above items of evidence, Item 5 con-

stitutes an important error of fact since the Court completely overlooked the letter of Nov. 5, 1958 from the inventor to Sears, with copies being sent to each of the Sears' plants. This letter (Appendix A to Plaintiff-Appellant's Opening Brief) details three serious operational failures encountered in the aligners during the Sears' experimental program, such failures being sufficiently serious to effect a complete breakdown of his Sears' molding apparatus. It should be quite apparent that this letter constitutes objective evidence that the Sears' program involved an experimental use and not a public use. *Certainly such a letter detailing the causes of machine breakdown is not the type sent to the purchaser of a commercially operable device.*

Turning now to Item 1 above, the fact that the inventor considered the Sears' program to be a commercial transaction does not render the Sears' program a public use, any more than the fact that the use of the public highway in the leading *Elizabeth v. Pavement Co.* case (cited by this Court in this decision) was a public use because the invention was directed to construction of a public highway. Obviously, in any experimental use situation a commercial transaction is concerned since inventors are normally engaged in business transactions rather than eleemosynary projects.

Next, with respect to Item 2, the fact that 248 aligners were shipped and paid for prior to the critical date does not render the Sears' program a public use any more than the shipping of and payment for the devices involved any experimental use case results in a public



use. In the *Progressive Engineering, Great Lakes Carbon and Ushakoff* cases cited in Appellant's briefs as upholding an experimental use, delivery and payment took place before the critical date (412 devices in *Progressive Engineering*). So far as payment is concerned in this case, it should be noted that Super Mold did not have sufficient capital to carry out the Sears' program unless it received payment for the aligners as they were delivered.

Regarding Item 3, it is clearly established patent law that public display of a device does not constitute a public use where the device is undergoing experimentation. By way of example, in *Elizabeth v. Pavement Co.* the Supreme Court stated that although the invention was publically used and in clear public sight for six years before a patent application was filed, a public use did not occur because the inventor was testing and developing the invention. In this case, it is uncontradicted that the inventor was testing and developing his invention prior to and after the critical date.

As to Item 4, the mere fact that prices were quoted and an aligner offered as a door prize prior to the critical date cannot constitute a public use since Super Mold did not even have aligners for sale prior to the critical date, the aligners being sold to others than Sears only after completion of the experimental program.

It will therefore be clear that of the five points this Court relied upon as establishing "overwhelming objective evidence" of a public use, *Item 5 is directly con-*

*trary to the facts and the other four items could as readily demonstrate that the Sears' program involved an experimental use as a public use.* On the other hand, the Court completely ignored important objective evidence demonstrating the Sears' program was directed to an experimental use rather than a public use. Such evidence includes, in addition to the aforementioned Fike letter of November 5, 1958, the facts that the aligners were hand-built one at a time rather than being constructed by the assembly line method as in the case of other Super Mold products, that the inventor closely followed the operation of the aligners and upon receiving a report of a breakdown in any particular machine he redesigned the faulty part and replaced such part in each of the Sears' machines, and the Sears' program involved a single sale to a single customer — the aligners were not on unrestricted sale to the retreading trade.

The above objective evidence appears in the record. During the hearing on the Motion for Summary Judgment petitioner's counsel pleaded for an opportunity to produce witnesses for the purpose of providing additional evidence, such counsel pointing out that this evidence could only be adduced by means of a trial. Such plea was first ignored by the District Court and then by this Court.

It should be clear that had this Court properly analyzed the objective evidence it would have concluded that the Sears' program involved an experimental rather than a public use. Even if such conclusion was not



reached, certainly petitioner presented sufficient objective evidence of an experimental use to at least have created a doubt in the Court's mind on this point.

Prior to receiving the decision in this case petitioner understood that the law in this Circuit regarding the propriety of granting a Motion for Summary Judgment was still the same as expressed by this Court in *Neff Instrument Corp. v. Cohu Electronics*, 269 F.2d 668 (August 1959), wherein it was held:

“On appeal from an order granting defendants' motion for summary judgment the Circuit Court of Appeals must give the plaintiff the benefit of every doubt.

Certainly, however, the Court in this case failed to give plaintiff the benefit of every doubt. Accordingly, the Court did not apply the law as set forth in *Neff*. *If Neff is still good law the Court in this case then is not in uniformity with Neff.*

In addition to the aforementioned errors of fact this Court misapprehended the patent laws to petitioner's detriment. Thus, the Court in finding a public use repeatedly referred to the fact that the modifications made in the aligners did not appear in the patent application, the Court making note of this fact at three separate instances in its decision. Because such modifications did not appear in the patent application the Court felt they were not significant. *This feeling completely ignored the objective evidence that such modifications were*



*required to change the aligner from an unworkable device into a commercially operable machine.* This feeling also provided the basis for the unusual legal conclusion on Page 5 of the printed opinion that unless “such improvements would themselves be patentable, they do not necessarily suffice to bring within the experimental exception an invention which has otherwise traversed the statutory bounds of the exception”. (Citing *Tool Research*)

Although the above-quoted language appears somewhat ambiguous, petitioner understands that this Court believed the modifications made to the aligners during the Sears’ program had to be patentable in order to have the program fall under the experimental use doctrine. This requirement, of course, is completely at odds with the patent law and the Court in making this conclusion totally misapprehended the *Tool Research* case.

In *Tool Research* there was a public use of a so-called “flat-pack” method of making honeycomb over one year before the patent was filed. Subsequent to this first use, the inventor developed a “pre-formed” method and the patent application disclosed the latter method. The Court held that the differences between the two methods would have been obvious and accordingly the patent directed to the pre-formed method was invalid in view of the public use of the flat-pack method. Clearly the law of *Tool Research* does not apply to the facts in this case since in this case the patent application was directed to the inventor’s original concept of his apparatus.

Petitioner is not aware that any Court has heretofore contended the improvements made during an experimental program had to be patentable over the original inventive concept in order to justify an experimental use. There is certainly no statutory justification for such law and no decisional citations concerned with this concept could be located. It would be extremely unfortunate if this concept became the law in this Circuit based upon the decision in this case.

This Court also misapplied the facts in this case to the law as expressed in *Smith & Griggs* cited at Page 5 of the decision, this Court apparently being under the impression that Fike was merely trying to improve the quality of the performance of his aligner in conducting the Sears' program. The objective evidence in this case, as noted hereinabove, however established that the modifications were required to *change the aligner from an unworkable device into a commercially operable machine*.

Summarizing petitioner's position, this Court in finding a public use ignored the objective evidence demonstrating experimental use, overlooked the critical letter report of the inventor to Sears, and construed objective evidence which could just as well demonstrate an experimental use as a public use as demonstrating a public use. This action failed to give petitioner the benefit of the doubt as expressed in *Neff* and is thus not in uniformity with *Neff*. This Court also misapprehended the *Tool Research* case so as to erroneously conclude that since the modifications made during the Sears' program were not patentable the experimental use doctrine did not apply. Finally, the Court misapplied the facts in this case to the law of *Smith & Griggs*.

Petitioner therefor prays for a rehearing and ultimately for its day in Court — in open Court, not in camera.

Respectfully submitted,

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